TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 872

STATE OF GEORGIA, PETITIONER,

vs.

HIRAM W. EVANS, JOHN W. GREER, JR., AMERICAN BITUMULS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1942.

CERTIORARI GRANTED MARCH 2, 1942.

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INDEX.

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DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION.

Civil Action, File 2373.

STATE OF GEORGIA,

versus

HIRAM W. EVANS, JOHN W. GREER, JR., THE AMERICAN BITUMULS COMPANY, SHELL OIL COMPANY, INC., EMULSIFIED ASPHALT REFINING COMPANY.

COMPLAINT.

I.

Plaintiff is the State of Georgia, appearing by and through Ellis G. Arnall, Attorney General of the State of Georgia, upon direction of Hon. Eugene Talmadge, Governor of the State of Georgia.

II.

The defendant, Hiram Wesley Evans, is a resident of the State of Georgia, Fulton County, Georgia, and of the Northern District of Georgia. The defendant, John W. Greer, Jr., is a resident of the State of Georgia, Lanier County, Georgia, and of the Middle District of Georgia. The defendant, The American Bitumuls Company, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business at San Francisco, California, but being found and having an agent and transacting business in the State of Georgia and the Northern District of Georgia. The defendant,

Shell Oil Company, Inc., is a corporation incorporated under the laws of the State of Virginia, having its principal place of business at St. Louis, Missouri, but being found and having an agent and transacting business in the State of Georgia and the Northern District of Georgia. The defendant, Emulsified Asphalt Refining Company is a corporation incorporated under the laws of the State of South Carolina, having its principal place of business at Charleston, S. C., but being found and having an agent and transacting business in the State of Georgia, and the Northern District of Georgia.

III.

This action arises under the Act of October 15, 1914, Chapter 323, Section 4; 38 Statutes, 731; U. S. C. Title 15, Section 15; and the Act of July 2nd, 1890, Chapter 647, Section 1; 26 Statutes, 209; U. S. C. Title 16, Section I, as hereinafter more fully appears.

IV.

In all the purchases of emulsified asphalt made by the State Highway Board of Georgia as hereinafter alleged said Board was acting for and on behalf of the State Highway Department of Georgia and the State of Georgia, and said asphalt was purchased for use by the State of Georgia upon the roads, streets and highways under the jurisdiction, management and control of the State Highway Board of Georgia. Payments for said asphalt were made out of public funds derived from taxation and payable into the State Treasury of Georgia.

V.

At all times hereinafter alleged, the defendant, Hiram Wesley Evans, was engaged in the business of selling and promoting emulsified asphalt, and representing companies

(among others the companies herein named as defendants) manufacturing emulsified asphalt and selling same in the State of Georgia, and was doing business as the Southeastern Construction Company at Atlanta, Georgia.

VI.

At all times hereinafter alleged, and in the performance of all acts alleged, the defendant, John W. Greer, Jr., was employed by the State Highway Board of Georgia as purchasing agent at Atlanta, Georgia, and was acting in said capacity.

VII.

At all times hereinafter alleged and with respect to the matters alleged, the defendant corporations and companies herein named were manufacturers of emulsified asphalt and were doing business manufacturing said asphalt outside the State of Georgia and which moved into the State and was the subject of interstate commerce, and doing business in the State of Georgia selling more than ninety per cent of all emulsified asphalt sold for use in the State of Georgia. During said time said defendants were acting through their respective duly authorized officers, agents and representatives and contracts, negotiations, schemes, devices and practices hereinafter complained of were entered into, made and performed by said officers, agents or representatives with the knowledge and sanction of the respective corporations represented by the same.

VIII.

The emulsified asphalt manufactured by the defendant corporations was used in the State of Georgia during

the period beginning on or about April 20th, 1937, for the construction and maintenance of streets, roads and highways (under the jurisdiction and control of the State Highway Board of Georgia) as a binding, surfacing and paving material, and the defendant, John W. Greer, Jr., was the purchasing agent of said Board through whom said asphalt was purchased. During the period beginning on or about April 20th, 1937, and ending on or about December 1st, 1938, more than eighty-five per cent of all emulsified asphalt used in the State of Georgia was manufactured or processed in States other than Georgia, and the State Highway Board of Georgia was the principal purchaser, purchasing more than ninety per cent of all emulsified asphalt used in the State of Georgia. During said period the defendant corporations sold to the State of Georgia, on purchases made by the State Highway Board of Georgia, more than ninety-five per cent of all the emulsified asphalt purchased by said State Highway Board.

IX.

The locations of the refineries of the defendant corporations where emulsified asphalt so sold to the State Highway Board of Georgia during the period alleged in Paragraph VIII was manufactured or refined, and from which said emulsified asphalt was shipped into the State of Georgia to or for the State Highway Board, are as follows:

Name—Location of Refinery:

American Bitumuls Co., Baton Rouge, La. & Baltimore, Md.

Shell Oil Co. Inc., New Orleans, Louisiana.

Emulsified Asphalt Refining Co., Charleston, South Carolina.

X.

In making purchases of emulsified asphalt from defendant corporations, the State Highway Board of Georgia, purchased the same through a jobber or agent of said defendant corporations who was Hiram Wesley Evans, and the asphalt purchased was shipped in interstate commerce to or near the highway construction or maintenance job in the State of Georgia on which it was used, and the shipments hereinafter referred to were made by the defendant corporations from one or more of their refineries located in the States indicated above and into the State of Georgia.

XI.

During the period above alleged, purchases of emulsified asphalt were made from defendant corporations only after bids were advertised for and received. Under the law of Georgia and the custom, practice and policy of the State Highway Board of Georgia, the person, firm or corporation submitting the bid or offer to sell emulsified asphalt at the lowest price per gallon, provided such product met all specifications, tests and standards promulgated and established by said Board, was awarded the contract. It was the custom, practice and policy of the State Highway Board to notify all sellers or manufacturers of emulsified asphalt, doing business in this State, of the specifications, standards and tests of such product, when said Board desired to make purchases thereof, and to invite bids thereon. Under the law of Georgia and the custom, practice and policy of said Board, where quantities of emulsified asphalt were to be purchased of the value of more than $500.00 competitive bids from dealers, jobbers or manufacturers of said product were required to be advertised for and received and purchases made from the lowest bidder.

XII.

The State Highway Board of Georgia is the executive and administrative head of the State Highway Department with full power and authority and in full control of the State Highway Department, a department and agency of the State of Georgia.

XIII.

Beginning in or about January, 1937, and continuing from day to day thereafter down to and until December 31st, 1938, the defendants herein named, with full knowledge of the facts as to the law, and the custom, policies and practices of the State Highway Board in making purchases of emulsified asphalt, did knowingly and unlawfully combine, conspire, agree and have a tacit understanding together with each other and with divers other persons to restrain a part of the trade and commerce in emulsified asphalt among the several States of the United States and did, in fact, restrain said trade and commerce in violation of Section I of the Act of Congress of July 2, 1890, (26 Stat. 209), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Anti-Trust Act.

XIV.

It was a part of said combination and conspiracy, and the object and purpose thereof to accomplish and to do the following, among other things, to-wit:

(a) To arbitrarily, unlawfully, unreasonably and knowingly raise, fix, control, set, stabilize and effect the price of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(b) To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition between and among the defendant Evans and the defendant manufacturers of emulsified asphalt in the sale of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(c) To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition from competitors and prospective competitors of the defendant manufacturers of emulsified asphalt and defendant Evans, in the sale of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(d) To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition from any source in the sale of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(e) To establish and maintain unreasonably high, excessive, monopolistic and non-competitive prices for emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

As a part of said unlawful combination and conspiracy, in pursuance thereof and in furtherance thereof and to effectuate its object and purpose, the said defendants did do and perform certain acts and things and overt acts, and did use divers means and methods, including the following, among other things, to-wit:

(a) In or about January, 1937, defendant, Hiram Wesley Evans organized and caused to be organized at Atlanta, Georiga, a partnership under the name of Southeastern Construction Company for the purpose of en-

gaging in the promotion and sale of emulsified asphalt in the State of Georgia.

(b) In or about April, 1937, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company entered into an agreement and understanding with one, A. W. Mohr, acting on behalf of the defendant, American Bitumuls Company, whereby all sales in the State of Georgia of emulsified asphalt manufactured by said company were to be handled by said Evans. It was a part of said agreement and understanding that said American Bitumuls Company should submit bids in its own name to the State Highway Department of Georgia at prices directed by said Evans, and said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect at all times during the period as above alleged, in Paragraph VIII.

(c) In or about July, 1936, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the Southeastern Construction Company, entered into an agreement and uderstanding with one, Alex McDougald, acting on behalf of the defendant, Emulsified Asphalt Refining Company, whereby all sales in the State of Georgia of emulsified asphalt manufactured by said defendant, Emulsified Asphalt Refining Company, were to be handled by said Evans. It was a part of said agreement and understanding that the said Emulsified Asphalt Refining Company should submit bids in its own name to the State Highway Department of Georgia, at prices directed by said Evans, and he was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. This agree-

ment and understanding continued in force and effect at all times during the period first above alleged, in Paragraph VIII.

(d) In or about March, 1937, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company entered into an agreement and understanding with one, J. S. Sawyer, acting on behalf of defendant Shell Oil Company Inc., (or its predecessor corporation), whereby all sales in the State of Georgia of emulsified asphalt manufactured by said Shell Oil Company, Inc., (or its predecessor corporation), were to be handled by said Evans. It was a part of said agreement and understanding that the said Shell Oil Company, Inc., (or its predecessor corporation), should submit bids in its own name to the State Highway Board of Georgia at prices directed by said Evans, and said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect at all times during the period first above alleged, in Paragraph VIII.

(e) In or about May, 1937, defendants, together with divers other persons changed and caused to be changed the specifications and standards covering emulsified asphalt to be purchased by the State Highway Department of Georgia, so that only the emulsified asphalt manufactured by the defendant manufacturers of emulsified asphalt and handled and sold by defendant Evans, as aforesaid, would be acceptable and in accord therewith, thereby eliminating competition from competitive and prospective competitors of defendant Evans and of the defendant manufacturers of emulsified asphalt.

(f) In or about May, 1937, defendant, John W. Greer, Jr., acting in his capacity as purchasing agent for the

State Highway Department of Georgia, and in concert, collusion and conspiracy with defendant Evans, and in furtherance of the aforesaid combination and conspiracy, sent and caused to be sent to said defendant manufacturers of emulsified asphalt, several of their representatives, Southeastern Construction Company and defendant Evans notice of said change in specifications set forth in sub-paragraph (e) above, at the same time and thereafter failing and refusing to furnish said notice to competitors and prospective competitors of said defendant manufacturers of emulsified asphalt.

(g) At all times after the date of the change in said specifications and standards referred to in sub-paragraph (e) hereof, defendant, John W. Greer, Jr., acting in the capacity of purchasing agent for the State Highway Department of Georgia, notified the defendant Evans and the defendant manufacturers of emulsified asphalt of the proposed purchases of emulsified asphalt, at the same time and thereafter failing and refusing to notify competitors and prospective competitors of said Evans and the said defendant manufacturers of emulsified asphalt.

(h) At all times after said change in the specifications, defendant, John W. Greer, Jr., acting in the capacity of purchasing agent for the State Highway Department of Georgia and in concert, collusion and conspiracy with defendant Evans, refused to accept and rejected all bids submitted and attempted to be submitted by competitors and prospective competitors of the defendant Evans and said defendant manufacturers of emulsified asphalt, whether such bids of said competitors were lower than the bids submitted by said defendant manufacturers or not.

(i) The price contained in all emulsified asphalt bids submitted to the State Highway Department of Georgia

and the price paid by said Department for emulsified asphalt was dictated, controlled, set and fixed by the combination and conspiracy in the following manner:

(1) Pursuant to the arrangements and agreements set forth in sub-paragraphs (a) and (d) above, inclusive, defendant Evans submitted and caused to be submitted in the name of Southeastern Construction Company bids on emulsified asphalt to be purchased by the State Highway Department of Georgia. If said Southeastern Construction Company was the low bidder and was awarded the order for said asphalt, defendant Evans furnished the State Highway Department of Georgia with emulsified asphalt manufactured by said defendant, American Bitumuls Company.

(2) In further pursuance of the aforesaid arrangements and agreements, set forth in sub-paragraphs (a) and (d) inclusive, defendant Evans directed the price to be contained in bids submitted by defendant manufacturers of emulsified asphalt in their own names to the State Highway Department of Georgia.

(3) The said defendant manufacturers of emulsified asphalt, in submitting bids in their own names to the State Highway Department of Georgia submitted the price so directed by defendant Evans.

(4) The said defendant manufacturers of emulsified asphalt, acting as aforesaid, thereby permitted defendant Evans to predetermine which of said defendants should submit the lowest bid.

(5) The defendant manufacturer of emulsified asphalt submitting, in accordance with directions from defendant Evans, the lowest bid was awarded the contract or order

for emulsified asphalt by the State Highway Board of Georgia at the price so fixed and predetermined by defendant Evans as aforesaid.

(6) The defendant manufacturer of emulsified asphalt receiving said contract or order from the State Board of Georgia for emulsified asphalt, at the price fixed, controlled, set and predetermined as aforesaid, shipped in interstate commerce from its refinery located outside of the State of Georgia the emulsified asphalt so purchased and ordered to or for the State Highway Board of Georgia at the delivery point within the State of Georgia as so ordered by said Board.

(j) On or about March 29th, 1938, defendant, John W. Greer, Jr., acting in his official capacity as purchasing agent for the State Highway Department of Georgia, attempted to reject a bid submitted by one, Samuel E. Finley, selling emulsified asphalt manufactured by the Texas Company, which had been submitted as a result of an invitation extended by a subordinate of said John W. Greer, Jr., without the latter's knowledge and through inadvertance, and the said bid was lower than the bid submitted by the defendant Evans and the defendant manufacturers of emulsified asphalt herein named. The said John W. Greer, Jr., on said occasion, upon discovering that the said low bid had been submitted by the said Finley, and that the said Finley had, through inadvertance of a subordinate of Greer, been invited to bid thereon, attempted to cancel all invitations, and extend new invitations to the defendant Evans and the said defendant manufacturers, and exclude the said Finley from further bidding.

(k) As a result of said incident referred to in subparagraph (j) above, and in or about April, 1938, defend-

ant, John W. Greer, Jr., acting in concert and collusion with defendant Evans, in furtherance of said combination and conspiracy, knowingly and deliberately divided large orders for emulsified asphalt for single road projects under the jurisdiction of the State Highway Department of Georgia into numerous small orders of less than $500.00 each, for the purpose of awarding said small orders to the defendant Hiram Wesley Evans without receiving competitive bids therefor, at a price fixed and agreed upon by said defendants.

(l) During the period from April, 1937, to March 28th, 1938, inclusive, as a result of the operation of said combination and conspiracy, through the arrangements, agreements and acts set forth in sub-paragraphs (a) to (k) inclusive, defendant Hiram Wesley Evans received a commission or other compensation on each gallon of emulsified asphalt purchased by the State Highway Board of Georgia, at prices raised, enhanced, fixed, maintained and controlled as aforesaid.

XVI.

While said conspiracy, arrangement and understanding between the defendants named herein was in existence, the State Highway Department purchased from defendant, Hiram Wesley Evans, doing business as Southeastern Construction Company, a total of 2,480,980 gallons of emulsified asphalt at and for the sum of $285,019.96, which price was unreasonable and excessive due to the unlawful and illegal conspiracy, agreements and arrangements between the defendants named herein to raise, fix, maintain and control said prices. The reasonable price at which said amount of emulsified asphalt could have been purchased under natural and free competitive conditions was $199,222.69. As a result of said con-

spiracy so existing at the time these purchases were made from said defendant the State of Georgia has suffered damage and injury in its property in the actual amount of $85,797.27, and is entitled under Section 4 of said Sherman Anti-Trust Act, Title 15, U. S. C. A., Section 15, to threefold damages in the amount of $257,391.81.

XVII.

During the existence of said illegal conspiracy, combination, agreement and arrangement, as aforesaid, the State Highway Department of Georgia purchased from the defendant, Emulsified Asphalt Refining Company, a total of 1,272,131 gallons of emulsified asphalt at and for the sum of $131,376.56. The price paid to said defendant for said asphalt was, as a direct and proximate result of said illegal conspiracy, combination, agreement and arrangement whereby the price thereof was raised, fixed and determined by defendant Evans, excessive and unreasonable, in that the State Highway Department could have purchased said amount of asphalt in a free and competitive market, under natural competitive conditions, at and for the sum of $102,152.11. The State of Georgia has, on account of said illegal conspiracy, combination, agreement and arrangement on the part of the Emulsified Asphalt Refining Company and the other named defendants herein, been actually injured and damaged in its property in the sum of $29,224.45, and under Section 4 of said Sherman Anti-Trust Act (Title 15 U. S. C. A. Section 15) is entitled to threefold damages in the amount of $87,673.35.

XVIII.

While said illegal conspiracy, combination, agreement and arrangement, as aforesaid, was in existence the State

Highway Department of Georgia, purchased from the defendant, Shell Oil Company, (or its predecessor corporation) in the manner above alleged the total of 689,055 gallons of emulsified asphalt at and for the price of $68,-336.52, which price was excessive and unreasonable, in that the reasonable price and value of said amount of asphalt under free and natural competitive conditions was only $55,331.11. As a direct and proximate result of said illegal conspiracy, combination, agreement and arrangement on the part of the Shell Union Company, the State of Georgia has been actually damaged and injured in its property in the sum of $13,005.41; and by virtue of Section 4 of the Sherman Anti-Trust Law (Title 15 U. S. C. A. Section 15) is entitled to recover threefold damages of said defendant in the amount of $39,-016.23.

Wherefore, the State of Georgia prays judgments for said amounts as compensation for its injuries and damages sustained in the manner and the amounts as above alleged, together with interest thereon and costs.

Count II.

XIX.

Complainant does hereby reaffirm, reallege and incorporate as if herein set forth in full, and adopts by reference, all of the allegations set forth in Paragraph I through XII of Count I of this complaint, except Paragraph III.

XX.

This action arises under the Act of October 15th, 1914, Chapter 323, Section 4; 38 Statutes, 731; U. S. C., Title

15, Section 15 and the Act of July 2, 1890, Chapter 647, Section 2; 26 Statutes 209; U. S. C. Title 15, Section 2, as hereinafter more fully appears.

XXI.

Beginning in or about January, 1937, and continuing from day to day thereafter down to and until December 31st, 1938, the defendants herein named, together with divers other persons, well knowing all of the foregoing facts, knowingly and unlawfully did monopolize, attempt to monopolize, and did combine and conspire with each other and other persons to monopolize a part of the trade and commerce in emulsified asphalt among the several States of the United States, in violation of Section 2 of the Act of Congress, of July 2nd, 1890, (26 Stat. 209; Title 15, U. S. C. A. Section 15), entitled "An act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Anti-Trust Act.

XXII.

It was a part of said unlawful monopoly, attempt to monopolize, and combination and conspiracy to monopolize, and the object and purpose thereof, to effect and accomplish the following, among other things, to-wit:

(a) To create and maintain a monopoly in the sale of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(b) To arbitrarily, unlawfully, unreasonably and knowingly raise, fix, control, act, stabilize and affect the price of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia, and purchased by

the State Highway Department of Georgia, for and on behalf of the State of Georgia.

(c) Establish and maintain unreasonably high, excessive, monopolistic and non-competitive prices on emulsified asphalt shipped in inter-state commerce, as aforesaid, into the State of Georgia, for purchase and use by the State Highway Department of Georgia, for and on behalf of the State of Georgia.

(d) Arbitrarily, unlawfully, unresonably and knowingly to prevent, suppress, and eliminate competition in the sale of emulsified asphalt shipped in inter-state commerce, as aforesaid, into the State of Georgia, for purchase and use by the State of Georgia through its State Highway Department.

XXIII.

As a part of the unlawful monopoly, attempt to so monopolize, and combination and conspiracy to monopolize, and pursuant thereto and in furtherance thereof, and to effectuate its object and purposes defendants herein named and divers other persons, did do and perform certain acts and things and did use divers means and methods, including among other things, the following, to-wit:

(a) In or about January, 1937, defendant Hiram Wesley Evans organized and caused to be organized at Atlanta, Georgia, a partnership under the name of Southeastern Construction Company, for the purpose of engaging in the promotion and sale of emulsified asphalt in the State of Georgia, and especially to the State Highway Department of Georgia.

(b) In or about April, 1937, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company, entered into an agreement and understanding with one, A. W. Mohr, acting on behalf of the defendant, American Bitumuls Company, whereby all sales in the State of Georgia of emulsified asphalt manufactured by said American Bitumuls Company were to be handled by said Evans. It was a part of said agreement and understanding that the said American Bitumuls Company should submit bids in its own name to the State Highway Board of Georgia at prices directed by said Evans. Said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect at all times from on or about June, 1936, to May 30th, 1940.

(c) In or about July, 1936, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company, entered into an agreement and understanding with one, Alex McDougald, acting on behalf of defendant Emulsified Asphalt Refining Company, whereby all sales in the State of Georgia of emulsified asphalt manufactured by said Emulsified Asphalt Refining Company, were to be handled by said Evans. It was a part of said agreement and understanding that the said Emulsified Asphalt Refining Company should submit bids in its own name to the State Highway Board of Georgia at prices directed by said Evans. Said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect from on or about July, 1936, to May 30th, 1940.

(d) In or about March, 1937, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company, entered into an agreement and understanding with one, J. S. Sawyer, acting on behalf of defendant, Shell Oil Company, Inc., (or its predecessor corporation), whereby all sales in the State of Georgia of emulsified asphalt manufactured by said Shell Oil Company, Inc., (or its predecessor corporation), were to be handled by said Evans. It was a part of said agreement and understanding that the said Shell Oil Company, Inc., (or its predecessor corporation), should submit bids in its own name to the State Highway Board of Georgia at prices directed by said Evans. Said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect at all times from on or about March, 1937, to May 30th, 1940.

(e) In or about May, 1937, defendant Evans and other persons acting at his instance changed and caused to be changed the specifications covering emulsified asphalt to be purchased by the State Highway Board of Georgia so that only the emulsified asphalt manufactured by the defendant manufacturers of said product and handled and sold by defendant Evans, as aforesaid, would be acceptable or conform thereto, thereby eliminating competition from competitors and prospective competitors of defendant Evans and the said defendant manufacturers of emulsified asphalt.

(f) In or about May, 1937, defendant, John W. Greer, Jr., acting in his capacity as purchasing agent for the State Highway Department of Georgia and in concert and collusion with defendant Evans, and in furtherance of the aforesaid monopoly, attempt to monopolize, and combina-

tion and conspiracy to monopolize sent and caused to be sent to said defendant manufacturers of emulsified asphalt, several of their representatives, Southeastern Construction Company, and defendant Evans, notice of the change in specifications set forth in sub-paragraph (e) above, at the same time and thereafter failing and refusing to furnish said notice to competitors of said defendant manufacturers and of defendant Evans.

(g) At all times after the date of the change in said specifications referred to in sub-paragraph (e) hereof, defendant, John W. Greer, Jr., acting in the capacity of purchasing agent for the State Highway Department of Georgia, notified the defendant Evans and the defendant manufacturers of the proposed purchases of emulsified asphalt, at the same time and thereafter failing and refusing to notify competitors and prospective competitors of said Evans and said defendant manufacturers.

(h) At all times after the change in the specifications referred to in sub-paragraph (e) the defendant, John W. Greer, Jr., acting in the capacity of purchasing agent for the State Highway Department of Georgia, and in concert and collusion with defendant Evans, refused to accept and rejected all bids submitted and attempted to be submitted by competitors and prospective competitors of defendant Evans and defendant manufacturers, even though such bids were lower than those submitted by defendants named herein.

(i) The price contained in all emulsified asphalt bids submitted to the State Highway Board of Georgia, and the price paid by the State Highway Board of Georgia for emulsified asphalt were unreasonable and excessive and were dictated, controlled, set and fixed in the monopoly, attempt to monopolize and the combination and conspiracy to monopolize in the following manner:

(1) Pursuant to the arrangements and agreements set forth in sub-paragraph (a) to (d) inclusive, defendant Evans submitted and caused to be submitted in the name of the Southeastern Construction Company bids on emulsified asphalt to be purchased by the State Highway Board of Georgia. If said Southeastern Construction Company was the low bidder and was awarded the order for said asphalt, defendant Evans furnished the State Highway Department of Georgia with emulsified asphalt manufactured by said defendant, American Bitumuls Company.

(2) In further pursuance of the aforesaid arrangements and agreements set forth in sub-paragraphs (a) to (d) inclusive, defendant Evans directed the price to be contained in the bid submitted by the said defendant manufacturers of emulsified asphalt in their own names to the State Highway Board of Georgia.

(3) The said defendant manufacturers in submitting bids in their own names to the State Highway Board of Georgia, submitted the price directed by defendant Evans as aforesaid.

(4) The said defendant manufacturers acting as aforesaid thereby permitted defendant Evans to predetermine which of said corporations should submit the lowest bid.

(5) The defendant manufacturer of emulsified asphalt, submitting in accordance with directions from defendant Evans, the lowest bid was awarded the order for emulsified asphalt by the State Highway Board of Georgia, at the price so fixed, controlled, set and predetermined as aforesaid.

(6) The defendant manufacturers of emulsified asphalt receiving said order from the State Highway Board of Georgia at the price fixed, controlled, set and predeter-

mined as aforesaid, shipped the same in inter-state commerce from its refinery located outside of the State of Georgia designated or directed by the State Highway Board.

(j) On or about March 29th, 1938, defendant John W. Greer, Jr., acting in his official capacity as purchasing agent for the State Highway Department of Georgia, attempted to reject a bid submitted by one, Samuel E. Finley, selling emulsified asphalt manufactured by the Texas Company, which had been submitted as a result of an invitation extended by a subordinate of said John W. Greer, Jr., without his knowledge and through inadvertence, because said bid was lower than the bid submitted by the defendant Evans and the said defendant manufacturers. The said John W. Greer, Jr., on said occasion, upon discovering that the low bid had been submitted by Finley and that Finley had, through inadvertence of a subordinate of Greer, been invited to bid thereon, attempted to cancel all invitations, and extend new invitations to the defendants Evans and the defendant manufacturers, but excluding the said Finley.

(k) As a result of said incident above referred to, and in or about April, 1938, defendant John W. Greer, Jr., acting in concert and collusion with defendant Evans, in furtherance of said monopoly, attempt to monopolize, and combination and conspiracy to monopolize, knowingly and deliberately divided large orders for emulsified asphalt for single road projects under the jurisdiction and control of the State Highway Board of Georgia into numerous small orders of less than $500.00 each for the purpose of awarding same to the defendant, Hiram Wesley Evans, without receiving competitive bids therefor, at a price fixed and agreed upon by said defendants.

(l) During the period from May, 1937, to March 28th, 1938, inclusive, as a result of said monopoly, attempt to monopolize, and combination and conspiracy to monopolize, through the arrangements, agreements and acts set forth in sub-paragraphs (a) to (k) inclusive, defendant Hiram Wesley Evans, received a commission or other compensation on each gallon of emulsified asphalt purchased by the State Highway Board of Georgia, at prices fixed, maintained, and controlled as aforesaid, which said prices were excessive and unreasonable.

XXIV.

The monopoly, attempt to monopolize and combination and conspiracy to monopolize, herein alleged was commenced and has been operated and carried on by said defendants during and throughout the period of time aforesaid and in pursuance thereof said defendants named herein performed, among other things, the following acts.

(a) Beginning in or about April, 1937, attempted to monopolize the sale of emulsified asphalt to the State Highway Board of Georgia at Atlanta, Georgia.

(b) On or about Oct. 19th, 1937, shipped emulsified asphalt in interstate commerce from New Orleans, La., to Blue Ridge, Fannin Co., Georgia.

(c) On or about Nov. 1st, 1937, submitted to the State Highway Board of Georgia at Atlanta, Ga., bids on emulsified asphalt to be shipped in interstate commerce into the State of Georgia, at prices established, fixed, raised, set and stabilized by the defendant, Hiram Wesley Evans.

(d) On or about March 1st, 1937, and on various days and dates thereafter, at Atlanta, Georgia, met, conferred and communicated with one another, and with others for

the purpose of monopolizing, attempting to monopolize and combining and conspiring to monopolize as aforesaid.

(c) On or about October 4th, 1937, and on various days and dates thereafter at Atlanta, Georgia, sold emulsified asphalt to the State Highway Board of Georgia, at prices established, fixed, raised, controlled, set and stabilized, which said prices were unreasonable and excessive.

(f) On or about January 1st, 1937, and on various days and dates thereafter at Atlanta, Georgia, negotiated, entered into, and carried on arrangements for selling emulsified asphalt in monopolizing, attempting to monopolize, and combining and conspiring to monopolize as aforesaid.

(g) On or about January 1st, 1937, at Atlanta, Georgia, organized the Southeastern Construction Company for the purpose of selling emulsified asphalt in the attempt to monopolize as aforesaid.

(h) Did do and perform all of the other acts and things hereinbefore alleged.

XXV.

While said conspiracy, arrangement and understanding between the defendants named herein was in existence, the State Highway Department purchased from defendant, Hiram Wesley Evans, doing business as Southeastern Construction Company, a total of 2,480,980 gallons of emulsified asphalt at and for the sum of $285,019.96, which price was unreasonable and excessive due to the unlawful and illegal conspiracy, agreements and arrangements between the defendants named herein to raise, fix, maintain and control said prices. The reasonable price at which

said amount of emulsified asphalt could have been purchased under natural and free competitive conditions was $199,222.69. As a result of said conspiracy so existing at the time these purchases were made from said defendant the State of Georgia has suffered damage and jury in its property in the actual amount of $85,797.27, and is entitled under Section 4 of said Sherman Anti-Trust Act, Title 15, U. S. C. A., Section 15, to threefold damages in the amount of $257,391.81.

XXVI.

During the existence of said illegal conspiracy, combination, agreement and arrangement, as aforesaid, the State Highway Department of Georgia purchased from the defendant, Emulsified Asphalt Refining Company, a total of 1,272,131 gallons of emulsified asphalt at and for the sum of $131,376.56. The price paid to said defendant for said asphalt was, as a direct and proximate result of said illegal conspiracy, combination, agreement and arrangement whereby the price thereof was raised, fixed and determined by defendant Evans, excessive and unreasonable, in that the State Highway Department could have purchased said amount of asphalt in a free and competitive market, under natural competitive conditions, at and for the sum of $102,152.11. The State of Georgia has, on account of said illegal conspiracy, combination, agreement and arrangement on the part of the Emulsified Asphalt Refining Company and the other named defendants herein, been actually injured and damaged in its property in the sum of $29,224.45, and under Section 4 of said Sherman Anti-Trust Act (Title 15 U. S. C. A. Section 15) is entitled to threefold damages in the amount of $87,673.35.

XXVII.

While said illegal conspiracy, combination, agreement and arrangement, as aforesaid, was in existence the State

Highway Department of Georgia purchased from the defendant, Shell Oil Company, (or its predecessor corporation), in the manner above alleged the total of 689,055 gallons of emulsified asphalt at and for the price of $68,336.52, which price was excessive and unreasonable, in that the reasonable price and value of said amount of asphalt under free and natural competitive conditions was only $55,331.11. As a direct and proximate result of said illegal conspiracy, combination agreement and arrangement on the part of the Shell Oil Company, the State of Georgia has been actually damaged and injured in its property in the sum of $13,005.41, and by virtue of Section 4 of the Sherman Anti-Trust Law (Title 15 U. S. C. A. Section 15) is entitled to recover threefold damages of said defendant in the amount of $39,016.23.

Wherefore, the State of Georgia prays judgments for said amounts as compensation for its injuries and damages sustained in the manner and the amounts as above alleged, together with interest thereon and costs.

ELLIS ARNALL,
Attorney General,
ANDREW J. TUTEN,
Assistant Attorney General,
E. L. REAGAN,
Assistant Attorney General,
PRESTON RAWLINS,
Assistant Attorney General,
CARLTON MOBLEY,
Assistant Attorney General,
LINTON S. JOHNSON,
Assistant Attorney General,
EMIL J. CLOWER,
Assistant Attorney General,
C. E. GREGORY, JR.,
Assistant Attorney General,
Counsel for State of Georgia.

Filed Mar. 25, 1941.

MOTION OF HIRAM W. EVANS TO DISMISS COMPLAINT.

26 (Title Omitted.)

Comes now the defendant, Hiram W. Evans, and respectfully moves that the complaint against him herein be dismissed for the following reasons:

1.

The plaintiff herein is the State of Georgia, and the State of Georgia is not a person upon whom a right of action is conferred by Section 7 of the Acts of Congress, commonly referred to as the Sherman Act, (Title 15, U. S. C. A., Section 15).

2.

A right of action to recover treble damages for injuries sustained by reason of a violation of the Anti-Trust Statutes of the United States and the remedy to enforce such right are conferred only by Section 7 of the Acts of Congress, commonly known as the Sherman Act, (Title 15, U. S. C. A., Section 15) and the plaintiff herein, the State of Georgia, is not a person upon whom either the right or the remedy is conferred by said section, and this Court is without jurisdiction of the subject-matter of this action.

3.

No right to sue for any of the damages alleged in the complaint and no remedy to enforce any such right in the Courts of the United States are conferred upon the plaintiff, the State of Georgia, by any of the statutes relied upon in the complaint, and the complaint should be

dismissed for lack of jurisdiction of the subject-matter by this Court and for want of a proper party plaintiff.

Wherefore, defendant, Hiram W. Evans, prays that this motion be sustained and the complaint be dismissed.

MORGAN BELSER,
E. CLEM POWERS,
JONES, POWERS & WILLIAMS,
Attorneys for Defendant,
Hiram W. Evans.

Filed Apr. 10, 1941.

MOTION TO DISMISS OF JOHN W. GREER, JR.

28 (Title Omitted.)

Now comes the defendant John W. Greer, Jr., within the time required by law and before filing responsive pleading, respectfully moves the Court to dismiss the said action as to this defendant, upon the following grounds:

1.

For lack of jurisdiction of the Court over the subject matter, in that the State of Georgia is not a "person injured in his business or property by anything forbidden in the anti-trust laws", within the meaning of the Act of Congress of July 2, 1890, c. 647, section 8, 26 Stat. 210, 15 U. S. C. A. 7, or of the Act of October 15, 1914, c. 323, section 4, 38 Stat. 731, 15 U. S. C. A. 15; nor is there any other applicable Federal statute, authorizing the bringing of said action in this Court by the plaintiff.

2.

For failure to state a claim upon which relief may be granted, in that said action by the State of Georgia as plaintiff is not authorized by any of the several statutes referred to in the first ground of this motion above, or by any other statute of the United States, nor is the same maintainable by the State of Georgia in said Court under any other principle or provision of the law.

Wherefore defendant John W. Greer, Jr., prays

(1) That his said motion to dismiss be inquired into by the Court and sustained, and

(2) That he be not required further to plead until after disposition of his said motion.

HAL LINDSEY,
Attorney for Defendant John W. Greer, Jr.

Filed Apr. 10, 1941.

MOTION OF AMERICAN BITUMULS COMPANY TO DISMISS COMPLAINT.

30 (Title Omitted.)

American Bitumuls Company respectfully moves the Court that the complaint against it herein be dismissed for the following reasons:

1.

The plaintiff herein is the State of Georgia, and the State of Georgia is not a person upon whom a right of action is conferred, as alleged in the second paragraph of the complaint, by the Acts of Congress of October 15, 1914, Chapter 323, Section 4; 38 Statutes 731; U. S. C. Title 15, Section 15, and the Act of July 2nd, 1890, Chapter 647, Section 1; 26 Statutes, 209; U. S. C. Title 15, Section 1, or by either of such Acts.

2.

A right of action to recover treble damages for injuries sustained by reason of a violation of the Anti-Trust Statutes of the United States and the remedy to enforce such right are conferred only by Section 7 of the Acts of Congress, commonly known as the Sherman Act, (Title 15, U. S. C. A., Section 15) and the plaintiff herein, the State of Georgia, is not a person upon whom either the right or the remedy is conferred by said section, and this Court is without jurisdiction of the subject-matter of this action.

3.

No right to sue for any of the damages alleged in the complaint and no remedy to enforce any such right in the Courts of the United States are conferred upon the plaintiff, the State of Georgia, by any of the statutes relied upon in the complaint, and the complaint should be dismissed for lack of jurisdiction of the subject-matter by this Court and for want of a proper party plaintiff.

Wherefore, defendant, American Bitumuls Company, prays that this motion be sustained and the complaint be dismissed.

PILLSBURY, MADISON & SUTRO,

Standard Oil Building,
San Francisco, California.

TAYLOR, PORTER, BROOKS & FULLER,

Louisiana National Bank Bldg.,
Baton Rouge, Louisiana.

BARRY WRIGHT,

Rome, Georgia.

Attorneys for Defendant, American Bitumuls Company.

MOTION OF SHELL OIL COMPANY, INC., TO DISMISS.

32 (Title Omitted.)

Comes now Shell Oil Company, Inc., one of the defendants in the above stated cause, and files this its motion to dismiss the complaint in the above stated cause and for grounds of its motion shows respectfully as follows:

1.

Plaintiff in this cause is the State of Georgia. The State of Georgia is not a person upon whom a right of action is conferred by Section 7 of the Act of Congress ordinarily referred to as the Sherman Act (U. S. C. A. Title 15, section 15).

2.

The cause of action sought to be asserted in the complaint herein is one for triple damages, alleged in the complaint to arise because of a violation of the Anti-Trust Act of the United States. The remedy to enforce such cause of action is found only in Section 7 of the Sherman Act (U. S. C. A. Title 15, section 15). The State of Georgia, which is the plaintiff in this cause, is not a person upon whom is conferred any right or any remedy by reason of said statute and this Court is without jurisdiction of the subject-matter hereof.

3.

The State of Georgia is not such a person as is given any right to sue for any damages, such as is alleged in the complaint in this cause, and no remedy to enforce any such right is given to the plaintiff, the State of Georgia, by any of the statutes referred to in the complaint herein. There is no jurisdiction in this Court under any of said statutes referred to in the complaint and the complaint should be dismissed for lack of jurisdiction of the subject-matter of the complaint, and also because there is no proper person as plaintiff in this cause, such as is given the right by the said statutes.

Wherefore, Shell Oil Company, Inc. prays that this its motion be sustained and the complaint herein dismissed.

ALSTON, FOSTER, MOISE, & SIBLEY,
E. W. MOISE,
Attorneys for Shell Oil Company, Inc., Defendant.

Filed Apr. 12, 1941.

MOTION TO DISMISS OF EMULSIFIED ASPHALT REFINING COMPANY.

34 (Title Omitted.)

Comes now Emulsified Asphalt Refining Company, one of the defendants in the above case, and moves the Court to dismiss the complaint for the following reasons:

1.

The facts set out in the complaint do not entitle the plaintiff to any relief prayed for against this defendant.

2.

The said complaint is predicated entirely on certain Federal statutes, as pointed out in the third paragraph of this complaint. The complainant herein is, as a matter of law, not entitled to sue under said statutes, and is not entitled to any rights under said statutes, and is not entitled to pursue any of the remedies given by the said statutes.

3.

The said statutes above referred to, being the statutes known as the Sherman Anti-Trust Act, and the various statutes amendatory thereto, purport to give a right of action to any person injured or damaged by the things named in said statutes, and the complainant, The State of Georgia, is not a person within the meaning of the term as used in said statutes, and hence is not entitled to maintain the said suit.

Wherefore said defendant moves that the said case be dismissed.

HIRSCH, SMITH & KILPATRICK,
Attorneys for Defendant, Emulsified Asphalt Refining Company.

Filed Apr. 10, 1941.

OPINION AND ORDER SUSTAINING MOTION OF HIRAM W. EVANS AND DISMISSING COMPLAINT.

36 (Title Omitted.)

The above Motion to Dismiss came on regularly to be heard and was argued orally and by brief.

The petition alleges a cause of action against defendant under the Sherman Anti-Trust Act, 15 U. S. C. A. section 15, and defendant moves to dismiss the action on the ground that the State of Georgia is not "a person" as the term is defined in Section 7 of the Act and therefore is not authorized to proceed under the Act.

The United States Supreme Court, in the recent case of United States vs. Cooper Corporation, ... U. S. ..... (61 S. Ct. Rep. 742), held that the United States was not a "person" within the Sherman Anti-Trust Act, authorizing any "person" to maintain a civil action for treble damages for injuries resulting from violation of the Act, but that the meaning of the word was "limited to what are usually known as natural and artificial person, that is, individuals and corporations."

The reasoning in this decision is equally applicable to this case where the State of Georgia is plaintiff, and under authority of this case, which of course is controlling here, it is ordered and adjudged that said motion be, and same hereby is sustained and said action against this movant dismissed.

This 31st day of July, 1941.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed July 31, 1941.

45 Opinions and Orders sustaining Motions of John W. Greer, Jr.—The American Bithumals Company—Shell Oil Company, Inc. and Emulsified Asphalt Refining Company, and Dismissing Complaint, omitted from the printed record said Opinions and orders being the same as the opinion and order sustaining motion of Hiram W. Evans, heretofore copied at page 34.

* * * * * * * * *

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46 NOTICE OF APPEAL.

(Title Omitted.)

Notice is hereby given that the State of Georgia, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgments entered in this action on July 31, 1941, sustaining the motion of each of the defendants above

named to dismiss the action as to said defendant and dismissing the action against each of said defendants.

ELLIS G. ARNALL,
Attorney for Appellant, the
State of Georgia.

Filed Aug. 30, 1941.

STATEMENT OF POINTS (ASSIGNMENTS OF ERROR).

47 (Title Omitted.)

Notice of Appeal having been filed, the State of Georgia, Appellant, makes the following statement of points and assigns the following errors in the record and proceedings in this case:

1.

The said District Court erred in sustaining the motions of the defendants to dismiss the petition on the grounds that the State of Georgia is not a "person" upon whom a right of action for treble damages is conferred under Section 7 of the Act of July 2, 1890, C. 647, 26 Stat. 209, 210, 15 U. S. C. A. Section 15, commonly known as the Sherman Act.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the judgments and decrees of the District Court of the United States for the Northern District of Georgia, Atlanta Division, dated July 31, 1941, in the above entitled cause, be reversed and a decree rendered in favor of this complainant.

ELLIS G. ARNALL,
(Ellis G. Arnall),
Attorney for the State of
Georgia, Appellant.

Service of the foregoing statement of points (assignments of error) acknowledged and copy received.

This 3rd day of September, 1941.

MORGAN BELSER,
Attorney for Hiram W. Evans, Appellee,
HAL LINDSAY,
Attorney for John W. Greer, Jr., Appellee,
B. B. TAYLOR,
Baton Rouge, La.
BARRY WRIGHT,
Rome, Ga.
Attorney for the American Bitumuls Company, Appellee,
E. W. MOISE,
Attorney for Shell Oil Company, Inc., Appellee,
MARION SMITH,
Attorney for Emulsified Asphalt Refining Company, Appellee.

Filed Sept. 4, 1941.

DESIGNATION OF CONTENTS OF RECORD.

49 (Title Omitted.)

Notice of Appeal having been filed, the State of Georgia, Appellant, designates the following portions of the record

as material to a clear understanding of the issue and to be contained in the record on appeal.

1. The complaint.

2. Motion of Hiram W. Evans to dismiss the complaint.

3. Motion of John W. Greer, Jr., to dismiss the complaint.

4. Motion of The American Bitumuls Company to dismiss the complaint.

5. Motion of Shell Oil Company, Inc. to dismiss the complaint.

6. Motion of Emulsified Asphalt Refining Company to dismiss the complaint.

7. Judgment entered July 31, 1941, dismissing the action as to Hiram W. Evans.

8. Judgment entered July 31, 1941, dismissing the action as to John W. Greer, Jr.

9. Judgment entered July 31, 1941, dismissing the action as to the American Bitumuls Company.

10. Judgment entered July 31, 1941, dismissing the action as to Shell Oil Company, Inc.

11. Judgment entered July 31, 1941, dismissing the action as to Emulsified Asphalt Refining Company.

12. Notice of appeal.

13. Statement of points (assignments of error).

14. Designation of contents of record.

15. Clerk's certificate.

ELLIS G. ARNALL,
(Ellis G. Arnall),
Attorney for the State of Georgia, Appellant.

Service of the foregoing designation of record acknowledged and copy received.

This 3rd day of September, 1941.

MORGAN BELSER,
Attorney for Hiram W. Evans, Appellee,
HAL LINDSAY,
Attorney for John W. Greer, Jr., Appellee,
B. B. TAYLOR,
Baton Rouge, La.
BARRY WRIGHT,
Rome, Ga.
Attorney for The American Bitumuls Company, Appellee,
E. W. MOISE,
Attorney for Shell Oil Company, Inc., Appellee,
MARION SMITH,
Attorney for Emulsified Asphalt Refining Company, Appellee.

Filed Sept. 4, 1941.

51 CLERK'S CERTIFICATE.

United States of America,
Northern District of Georgia. ss.

I, F. L. BEERS, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 50 pages contains a true, full, complete and correct copy of the original record, statement of points and all proceedings had in the matter of State of Georgia, Appellant, vs. Hiram W. Evans, John W. Greer, Jr., The American Bitumuls Company, Shell Oil Company, Inc., Emulsified Asphalt Refining Company, Appellees, as specified in the designation of contents of record herein and as the same remains of record and on file in the Clerk's office of the said District Court, at Atlanta, Georgia.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 5th day of September, A. D. 1941.

F. L. BEERS,
(Seal) Clerk, United States District Court, Northern District of Georgia.
By C. A. McGREW,
(C. A. McGrew),
Deputy Clerk.

[fol. 41] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 15th, 1941

No. 10,059

STATE OF GEORGIA

versus

HIRAM W. EVANS et al.

On this day this cause was called, and, after argument by Ellis Arnall, Esq., Attorney General of Georgia, for appellant, and Marion Smith, Esq., for appellees, was submitted to the Court.

[fol. 42] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10059

STATE OF GEORGIA, Appellant,

versus

HIRAM W. EVANS et al., Appellees

Appeal from the District Court of the United States for the Northern District of Georgia

(October 30, 1941)

OPINION OF THE COURT—Filed October 30, 1941

Before Foster, Hutcheson, and McCord, Circuit Judges

By the COURT:

The state of Georgia, through its Attorney General, brought this suit against American Bitumuls Co., Shell Oil Co., Inc., Emulsified Asphalt Refining Co., Hiram Wes-

ley Evans, a dealer in mulsified asphalt and John W. Greer, Jr., purchasing agent for the State Highway Board of Georgia, to recover damages, alleging the parties named and others had engaged in a conspiracy to control the sale of mulsified asphalt throughout the United States, in vio- [fol. 43] lation of the Sherman Anti-Trust Act of July 2, 1890. The complaint further alleged that the state of Georgia had been damaged in the amount of $13,005.41, through the payment of excessive prices for asphalt purchased. The prayer was for recovery of $39,016.23. Defendants moved to dismiss the suit on the ground that the State of Georgia is not a "person" entitled to bring such an action under the provisions of Sec. 7 of the Sherman Anti-Trust Act, T. 15 U. S. C. A. §15. The motions were granted and the suit dismissed.

The state of Georgia is a sovereign. The case is controlled by the decision of the Supreme Court in *United States vs. Cooper Corporation*, 312 U. S. 600. On the authority of that decision the judgment is Affirmed.

[fol. 44] JUDGMENT

Extract from the Minutes of October 30th, 1941

No. 10,059

STATE OF GEORGIA

versus

HIRAM W. EVANS et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, State of Georgia, be condemned to pay the costs of this cause in this Court.

[fol. 49] ORDER DENYING REHEARING

Extract from the Minutes of December 15, 1941

No. 10,059

STATE OF GEORGIA

versus

HIRAM W. EVANS, et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 50] MOTION AND ORDER STAYING MANDATE—Filed December 24th, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10,059

STATE OF GEORGIA

versus

HIRAM W. EVANS, JOHN W. GREER, JR., THE AMERICAN BITUMULS COMPANY, The Shell Oil Company, Inc., Emulsified Asphalt Refining Co.

REQUEST FOR STAY OF MANDATE

To the Honorable Judges of said Court:

Now comes the state of Georgia, appellant in said case, and shows as follows:

Judgment was entered October 30, 1941, affirming the judgment of the District Court. Appellant's petition for rehearing was filed November 17, 1941. Rehearing was denied December 15, 1941. Appellant intends to apply to the Supreme Court of the United States for a writ of certiorari, believing it has good cause and grounds for the

granting of said writ, and is now engaged in the preparation of the writ and a brief in support thereof. A stay of the mandate and of the execution of the judgment in this case will work no hardship on the respondents.

Wherefore, appellant prays that the issuance of the mandate of this court and the execution of its judgment be stayed for a period of three months from October, 1941, excluding the time between November 17, 1941, the date of filing the petition for rehearing, and December 15, 1941, the date on which rehearing was denied; that if the application for writ of certiorari is perfected and the case docketed in the Supreme Court of the United States within the period of the stay, the mandate and the execution of the judgment be [fol. 51] further stayed until the application for writ of certiorari has been acted on by the Supreme Court of the United States; that if the writ be granted, the mandate and execution of the judgment be further stayed until the cause has been finally determined by the Supreme Court of the United States; or upon the terms and conditions established by the judge or judges passing upon this request.

(Signed) Ellis Arnall, Attorney General of Georgia,
Counsel for Appellant.

I hereby certify that I have given notice of the foregoing request for a stay of the mandate to counsel of record for the appellees and to each of them, by inserting copies in separate envelopes addressed to Hon. Hal Lindsay, attorney for John W. Greer, Jr., Hurt Building, Atlanta, Georgia; Hon. Barry Wright, Attorney for American Bitumuls Company, Rome, Georgia; Hon. B. B. Taylor, Attorney for American Bitumuls Company, Louisiana National Bank Building, Baton Rouge, La., Hon. Morgan Belser, Attorney for Hiram W. Evans, Citizens and Southern National Bank Building, Atlanta, Georgia; Hon. E. W. Moise, Attorney for Shell Oil Company, Inc., Citizens and Southern National Bank Building, Atlanta, Georgia; Hon. Marion Smith, Attorney for Emulsified Asphalt Refining Company, Hurt Building, Atlanta, Georgia, sealing and stamping said envelopes and depositing the same in the United States Mail.

This the 22 day of December, 1941.

(Signed) Ellis G. Arnall, Attorney for Appellant.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 10059

STATE OF GEORGIA, Appellant,

versus

HIRAM W. EVANS, et al., Appellees

On consideration of the application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of sixty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within sixty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of sixty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 24th day of December, 1941.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 872

STATE OF GEORGIA,

Petitioner,

vs.

HIRAM W. EVANS, JOHN W. GREER, JR., AMERICAN BITUMULS COMPANY, SHELL OIL COMPANY, INC., EMULSIFIED ASPHALT REFINING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT.

ELLIS ARNALL,
Attorney General of Georgia,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 872

STATE OF GEORGIA,

Petitioner,

vs.

HIRAM W. EVANS, JOHN W. GREER, JR., AMERICAN BITUMULS COMPANY, SHELL OIL COMPANY, INC., EMULSIFIED ASPHALT REFINING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Georgia prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on October 30, 1941 (R. 42), affirming the judgment of the District Court for the Northern District of Georgia.

Statement.

A civil action was instituted March 25, 1941, by a complaint in the District Court to recover from the respondents $384,081.39. The complaint, brought in two counts, alleged in substance that the respondents had violated Sections 1 and 2 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. 1 and 2, commonly known as the Sherman Act, and that by reason of such violation the State of Georgia was injured and damaged in its property in the actual amount of $128,027.13. The prayer was for treble damages, the State of Georgia seeking to derive its right of action under Section 7 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 210, as supplemented by Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 731, 15 U. S. C. 15. (R. 1-26).[1]

By separate motions, the respondents sought to have the complaint dismissed on the ground that the State of Georgia was not a "person" upon whom a right of action for treble damages was conferred by Section 7 of the Act of July 2, 1890, or Section 4 of the Act of October 15, 1914. (R. 27-34).

The District Court sustained the motions to dismiss, and on July 31, 1941, entered separate judgments dismissing the complaint against each of the respondents. (R. 34).

An appeal was prosecuted to the Circuit Court of Ap-

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[1] The complaint referred to Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15 (R. 2 & 15), commonly known as the Clayton Act, because that section, being later in date and broader in scope than Section 7 of the Sherman Act, was believed to have superseded the latter, the Sherman Act being expressly included in the definition of "Anti-trust laws" as used in the 1914 Act. See 38 Stat. 731. After the complaint was filed, this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667, construed Section 7 of the Sherman Act. The District Court and Circuit Court of Appeals construed the complaint as one brought under Section 7 of the Sherman Act (R. 34 & 42). For this reason references in the petition nad brief are to both sections.

peals and on October 30, 1941, that court entered a judgment affirming the judgment of the District Court. (R. 42).

A petition for rehearing was filed Nov. 17, 1941 (R. 43) was entertained and was denied December 15, 1941 (R. 47). The mandate was stayed (R. 49).

The Question Presented.

Whether the State of Georgia when it has been injured in its property by reason of a violation of Sections 1 and 2 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. 1 and 2, may maintain a civil action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 731, 15 U. S. C. 15.

Statutes Involved.

Section 7 of the Act of July 2, 1890, Ch. 647, 26 Stat., 209, 210, provides:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 of the Act of July 2, 1890, Ch. 647, 26 Stat. 210, 15 U. S. C. 7 provides:

> "That the word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15, provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section I of the Act of October 15, 1914, Chapter 323, 38 Stat. 730, provides in part:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that 'Anti-trust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890; * * *."

Statement of Jurisdiction.

(1) This Court has jurisdiction to consider and grant this petition pursuant to Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. Section 347 (a).

(2) The original date of the judgment to be reversed is October 30, 1941 (R. 42). The petition for rehearing was filed Nov. 17, 1941, within the time provided by the rules of the Circuit Court of Appeals (R. 43), and the petition for a rehearing was denied December 15, 1941 (R. 47). The petition for certiorari was filed January 16, 1942, so that this petition is filed within the time prescribed by the Act of February 13, 1925, as amended, on which jurisdiction rests.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In affirming the judgment of the District Court.

(2) In holding that the case was controlled by the decision of the Supreme Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667;

(3) In applying the reasoning of the court and the conclusion reached in the case of *United States* v. *Cooper Corp.*, 312 U. S. 60, 61 Sup. Ct. 742, 85 L. Ed. 667, to a case in which a State and not the United States seeks to maintain an action for treble damages under Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

(4) In failing to hold that when it has suffered injury to its property by reason of a violation of Sections 1 and 2 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 15 U. S. C. 1 and 2, the State of Georgia is a "person" for the purpose of determining whether it may maintain an action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

(5) In construing the word "person" in that portion of Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, affording a right of action for treble damages to "any person" as excluding the State of Georgia.

(6) In failing to hold that a State is entitled to maintain an action for treble damages under Section 7 of the Act of July 2, 1890, and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

Reasons Relied On for Granting the Writ.

(1) The Circuit Court of Appeals construed Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, to exclude a State from a right of action for treble damages given by that Section. This Court has not as yet construed that Act on that question. The case involves a decision on an important question of Federal law not decided by this Court.

(2) The question squarely presented in this case is one of great importance which it is believed will again arise unless decided by this Court. In performing the functions necessary to the welfare of their people, the States purchase large quantities of commodities moving in interstate commerce. The money used in these purchases is largely derived from taxes imposed upon citizens of the States, and the States act as trustees in expending this money. The danger of injury to the property of the State by reason of a violation of the United States Anti-trust laws and especially of Sections 1 and 2 of the Sherman Act is always present. The instant case where the actual damage alleged was $128,027.13 (R. 14, 15, 24, 25, 26) is but illustrative. The question is one in which every State has an interest and which the States and their citizens and taxpayers are entitled to have settled.

(3) The decision of the Circuit Court of Appeals is believed to be founded upon an erroneous interpretation and application of the decision of this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667. In that case this Court held that the United States is not a "person" authorized to bring an action for treble damages under Section 7 of the Sherman Act. The reasoning and the rationale of that decision is not applicable to

a State, and the conclusions there reached were not controlling on the Circuit Court on the issue here involved. The right of a State under the United States Anti-trust laws to the protection of its proprietary interests was not before the Court in the *Cooper* case. The decision of the Circuit Court is believed to be in conflict with the decisions of this Court in *Pennsylvania* v. *Wheeling and Belmont*, 13 How. 518, 559, 14 L. Ed. 249, 266; *Texas* v. *White*, 7 Wall. 700, 19 L. Ed. 227; *Florida* v. *Anderson*, 1 Otto 667, 675, 23 L. Ed. 290, 297; *Missouri* v. *Illinois*, 180 U. S. 208, 45 L. Ed. 497; *Kansas* v. *Colorado*, 185 U. S. 125, 46 L. Ed. 838; and *Minnesota* v. *Northern Securities Company*, 194 U. S. 48, 68-71, 48 L. Ed. 870, 880-881, which affirmed the right of a State to sue to redress injuries which are analogous to those suffered by private individuals.

The decision of the Circuit Court is also believed to be in conflict with *Ohio* v. *Helvering*, 292 U. S. 360, 370, 78 L. Ed. 1307, 1310, which construed an Act of Congress using the word "person" as including a State within that designation. The decision of the Circuit Court is also believed to be in conflict with *Hall* v. *Wisconsin*, 13 Otto 5, 11, 26 L. Ed. 302, 305; *Murray* v. *Charleston*, 6 Otto 432, 445, 24 L. Ed. 760, 763; *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, 390, 38 L. Ed. 1014, 1021, which recognize the status of a State as an individual when it engages in ordinary commercial transactions with individuals.

(4) If the Circuit Court was correct in holding that this case is controlled by the decision of this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 667, then petitioner respectfully requests a review and reconsideration of the decision in that case.

(a) The decision in the *Cooper* case is believed to be in conflict with a prior doctrine, intrinsically sounder, an-

nounced by this Court in *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239, 22 L. Ed. 80, 82; *Stanley* v. *Schwalby*, 147 U. S. 508, 37 L. Ed. 259, that the sovereign may avail itself of the benefit of any Act although not named, but is not bound by acts imposing burdens, or tending to restrain or diminish any of its rights or interests, unless named. Statutes creating new rights and remedies are not excepted from the operation of this doctrine. The application of this rule in the *Cooper* case would have given the United States or a State the benefit of the remedy provided by Section 7 of the Sherman Act without binding the United States or the State by bringing it within the definition of that word; it would have shown that *In Re Fox*, 52 N. Y. 530, relied on by this Court, is against the weight of authority; it would have shown that Section 8 of the Act defining the word "person" did not exclude the United States or a State from the remedy provided by Section 7; it would have shown that Section I of the original draft of the bill which was eliminated by Senator Hoar was entirely unnecessary; it would have explained the use of the words "private right of action" in Section 5 of the Clayton Act stopping the running of statutes of limitation, and would have resulted in a construction of the Act in accord with the broad conceptions of public policy upon which it was founded, that the remedies provided should be coextensive with the evils sought to be prohibited.

(b) The question involved is an important question in which all of the States have similar interest. The *Cooper* case was not considered by a full bench, one Justice not participating in the consideration or decision of the case, and there being a vacancy on the Court. The Court divided four to three in the decision. No important private rights of property have intervened since that decision, as a result of it.

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

ELLIS ARNALL,
Attorney General of Georgia,
Counsel for Petitioner.

January , 1942.

Brief follows.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 872

THE STATE OF GEORGIA,

Petitioner,

vs.

HIRAM W. EVANS, JOHN W. GREER, JR., AMERICAN BITUMULS COMPANY, SHELL OIL COMPANY, INC., EMULSIFIED ASPHALT REFINING COMPANY.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

Statement.

This is an application for a writ of certiorari of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming a judgment of the United States District Court for the Northern District of Georgia.

The material facts and the questions involved are set forth in the foregoing petition. The assignments of error there set forth are here adopted as a part of this brief.

The Decision Below.

The opinion of the Circuit Court of Appeals (R. 41) is reported at *State of Georgia v. Evans, et al.*, 123 F. (2d) 57.

Statement of Jurisdiction.

The statement of jurisdiction set forth in the foregoing petition is here adopted as a part of this brief.

Question Presented.

The question for decision is: Is a State which has been injured in its property by a violation of Sections 1 and 2 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 15 U. S. C. 1 and 2, entitled to maintain an action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

Contentions of Petitioner.

It was not the intention of Congress, by the use of the word "person" in Section 7 of the Sherman Act and Section 4 of the Clayton Act to exclude a State from the remedies provided by those sections. When a State, as proprietor, has suffered injury analagous to that suffered by a private individual, it may avail itself of the remedies provided "persons" for the relief of such injury. A State is within the definition of "person" as used in a statute providing a remedy for the relief of an injury when the State has sustained the injury sought to be relieved by the statute. But even if a State is not strictly within the definition of "person" as used in Section 7 of the Sherman Act and Section 4 of the Clayton Act, its right to avail itself of the benefit of those sections is inherent by reason of its sovereignty, unless there is shown an intent, expressed or implied, on the part of Congress to exclude it from the remedies there provided. There is no such expressed or implied exclusion in those Acts. The decision of this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 667, is in conflict with a prior doctrine, intrinsically sounder and should be reviewed and overruled.

First Point.

In holding that the case was controlled by *United States* v. *Cooper Corp., supra,* the Circuit Court of Appeals overlooked the decisions of this Court that a State may sue to redress injuries which are analagous to those suffered by a private individual and may be a "person" within the meaning of that word as used in an Act of Congress.

The question of the right of a State to recover treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act was not presented, and hence not decided by this Court in *United States* v. *Cooper Corp., supra.* Those Acts have never been construed by this Court on that question. The *Cooper* case is not authority for the result reached by the Circuit Court of Appeals because the reasoning of that decision is applicable only to the United States.

The scheme and structure of the Anti-trust legislation did not afford to a State the relief by criminal prosecution or injunction that was specifically given to the United States. The States, unlike the United States, were not designated as such, nor named in the Acts. Thus the reasoning in the *Cooper* case that the ordinary dignities of speech would have led Congress to mention the name of the United States is not applicable to a State. Neither is the construction of United States officers an aid in determining whether Congress intended to exclude a State from the remedies provided by Section 7 of the Sherman Act and Section 4 of the Clayton Act. Other aids to construction must be sought.

At the time of the passage of the Sherman Act, it must have been apparent to Congress that States were as liable to injury by violations of the Act as were individuals. States had been recognized by this Court as engaging in ordinary commercial transactions with individuals, and for the purpose of binding them, had been held to be acting as

individuals when so engaged. *Murray* v. *Charleston*, 6 Otto 432, 445, 24 L. Ed. 760, 763; *Hall* v. *Wisconsin*, 13 Otto 5, 11, 26 L. Ed. 302, 305. See also, *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, 390, 38 L. Ed. 1014, 1021.

So, it had been held long prior to the passage of the Sherman Act that every sovereign State is of necessity a body politic or artificial person. *Cotton* v. *U. S.*, 11 How. 229, 231, 13 L. Ed. 675.

In *Ohio* v. *Helvering*, 292 U. S. 360, 369, 78 L. Ed. 1307, 1310, decided more recently, this Court rejected a contention that a State was not a "person" within the meaning of an Act of Congress and as authority sustaining that conclusion, cited cases wherein it appeared that a State had been afforded the benefit of statutes using the word "person." Compare *South Carolina* v. *United States*, 199 U. S. 437, 457-463, 50 L. Ed. 261, 268-270; *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439, 449-453, 82 L. Ed. 1448, 1457-1458.

It was also well established by decisions of this Court prior to the passage of the Sherman Act that a State could sue to redress injuries which were analagous to those suffered by private individuals. *Pennsylvania* v. *Wheeling and Belmont*, 13 How. 518, 559, 14 L. Ed. 249, 266; *Texas* v. *White*, 7 Wall. 700, 19 L. Ed. 227; *Florida* v. *Anderson*, 1 Otto 667, 675, 25 L. Ed. 290, 297. See also, *Missouri* v. *Illinois*, 180 U. S. 208, 45 L. Ed. 497; *Kansas* v. *Colorado*, 185 U. S. 125, 146, 46 L. Ed. 838, 846.

A few years after the adoption of the Sherman Act, the State of Minnesota sought a remedy by injunction under that Act. This was before the Clayton Act gave a remedy by injunction to "persons". It was contended by Minnesota that the Act of Congress was for the benefit of all the people and, therefore, the case was to be deemed one arising under the laws of the United States, and cognizable by the Circuit Court, because one of the objects of Minnesota by its

suit was to protect certain of its proprietary interests, which, it was alleged, would be injured by violations, on the part of the defendants, of the Act of Congress. The attention of the Court was directed by the brief to the rule that a State may sue to redress injuries which are strictly analagous to those suffered by private individuals. The Court recognized the rule, but pointed out that the injury alleged was too remote and indirect to allow an individual to maintain the action. It held that the intention of the Act was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States under the 4th Section of the Act. *State of Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 52, 68-71, 48 L. Ed. 872, 873, 880-881.

It is significant, therefore, that when the Clayton Act was adopted in 1914, it not only provided injunctive relief to "persons" using that term with the same meaning as it had been used in the earlier Sherman Act, but added as a part of Section 16 giving the injunctive relief, a proviso, as follows: "Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States to bring suit in equity for injunctive relief against any common carrier. * * *" (See appendix.) This was a clear recognition of the broad and inclusive sense in which the words "person, firm, corporation or association" had been used in this section and in other parts of the Act.

Summary.

The allegations of the petition show that the State of Georgia, like any individual, purchased in the open market commodities moving in interstate commerce. By reason of

a violation by the respondents of the Sherman Act, the State sustained an injury to its property; the same injury for which a redress is given to "persons" by Section 7 of the Sherman Act and Section 4 of the Clayton Act. A State has been held to be a "person" within the meaning of an Act of Congress. The implied prohibition which might prevent the United States from pursuing the remedy by civil action for treble damages, because it is named in other sections of the anti-trust acts giving it specific means of enforcing the Acts, does not operate against a State.

Since the anti-trust acts are founded upon broad conceptions of public policy, the remedies provided must be construed as coextensive with the injury sought to be prevented. A construction which would exclude a State from the remedy by civil action for treble damages not only ignores the liberal construction which must be given the remedial provisions of the act, but leads to an unreasonable and unjust result. If a State is a "person" within the meaning of an act of Congress regulating an activity in which a State engages, it is also a "person" for the purpose of availing itself of the remedies provided by an Act of Congress for the injuries which it has sustained.

Second Point.

If a state is not strictly within the definition of "person" as used in Section 7 of the Sherman Act and Section 4 of the Clayton Act, it still may avail itself of the benefit of those sections by virtue of its sovereignty. The decision in *United States* v. *Cooper Corp.*, *supra*, is in conflict with a prior doctrine, intrinsically sounder, and should be re-examined and overruled.

A. *Cooper* case in conflict with doctrine that sovereign may avail itself of the benefit of any act.

The decision in *United States* v. *Cooper Corp., supra,* is in conflict with the doctrine that the sovereign may avail itself of the benefit of any act, although not named, but is not bound by acts imposing burdens or tending to diminish or restrain any of its rights and interests unless named. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239, 22 L. Ed. 80, 82; *Stanley* v. *Schwalby,* 147 U. S. 508, 515, 37 L. Ed. 259, 262.

This rule was derived from the English Common Law. *Queen and Buckberds Case,* 1 Leon. 149, 74 Eng. Rep. 138; *Lord Berkley's Case,* Plowden 223, 243, 75 Eng. Rep. 339, 372; *The Case of a Fine,* 7 Coke 32a, 77 Eng. Rep. 459.

Thus the question presented in this case, as in the *Cooper* case, does not depend upon whether the sovereign is strictly within the definition of "person" as used in Section 7 of the Sherman Act and Section 4 of the Clayton Act. *The Northern No. 41,* 297 Fed. 343; *The Southern Cross,* 24 F. S. 91.

However, the rule affording the sovereign the benefit of any act has often found its modern application in cases holding the United States or a State to be a "person", entitled to the remedies, benefits, or protection of statutes using that term. *Stanley* v. *Schwalby, supra; In re Western Implement Co.,* 166 Fed. 576, 582; *State* v. *Duniway,* 63 Ore. 555, 128 P. 853, 854; *Vestal* v. *Pickering,* 125 Ore. 553, 267 P. 821, 822; *Indiana* v. *Worâm,* 6 Hill 33, 40 Am. Dec. 378, 381; *People* v. *Utica Ins. Co.,* 15 Johns 358, 8 Am. Dec. 243, 252; *Dixon* v. *United States,* 125 Mass. 311, 28 Am. Rep. 230; *In re Edges Estate,* 339 Pa. 67, 14 A. (2) 293; *State* v. *Odd Fellows Hall Ass'n,* 123 Neb. 440, 243 N. W. 616, 619; *State* v. *Gen. Am. Life Ins. Co.,* 132 Neb. 520; 272 N. W. 555, 557.

Section 7 of the Sherman Act and Section 4 of the Clayton Act affording the right of action for treble damages, are remedial. *Chattanooga Foundry and Pipe Works Co.* v. *Atlanta,* 203 U. S. 390, 397, 51 L. Ed. 241, 244; *Shelton*

Electric Co. v. *Victor Talking Machine* Co., 277 Fed. 433; *Hicks* v. *Pickins Moving and Storage Co.*, 87 F. (2d) 583; *Strout* v. *United States Shoe Machinery Co.*, 193 Fed. 313. The United States or the States, as sovereigns, may therefore avail themselves of the benefit of those sections.

(1) Acts creating new rights and remedies not excepted.

The rule affording the sovereign the benefit of any act does not except acts creating new rights and remedies. The cases of *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174, 35 Sup. Ct. 398, 401, 59 L. Ed. 520, Ann. Cas. 1916A, 118; *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27, 29, 36 Sup. Ct. 233, 234, 60 L. Ed. 505; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 593, 41 Sup. Ct. 209, 210, 65 L. Ed. 425, cited in the *Cooper* case as holding that acts creating new rights and remedies are available only to those upon whom they are conferred, were not cases in which the prerogative of the sovereign, or public rights were involved. Public policy dictates that if there be a conflict in the rules, the former must control.

(2) *In re Fox*, 52 N. Y. 530, against weight of authority.

The case of *In re Fox*, 52 N. Y. 530, relied on by this Court as holding that since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it, not only overlooked the rule affording the sovereign the benefit of any act, but was founded upon a failure by the State court to find the authorities sustaining a different result. The New York court said: "But no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a State or a Nation. Its meaning may be extended by express definition so as to include a government or sover-

eign." Compare *Indiana* v. *Woram*, *supra*; *People* v. *Gilbert*, 18 Johns, 227.

(3) Use of the word "person" in other parts of the Acts.

Since the right of the sovereign to avail itself of the benefit of the remedial provisions of the anti-trust laws does not depend upon it being strictly within the definition of the word "person" as used in those provisions, the fact that the word "person" is used in the same or other provisions of the Acts in a restrictive sense, or in a sense inapplicable to the sovereign, fails to support a conclusion that the sovereign is not entitled to the remedies provided. But under any view of the case, words used in a sense which would burden, or tend to restrain or diminish any of the rights or interests of the sovereign should not be applied to the sovereign unless named or unless demanded by the context. *Dollar Savings Bank* v. *United States*, *supra*; *Stanley* v. *Schwalby*, *supra*; *Nardone* v. *United States*, 302 U. S. 379, 383, 82 L. Ed. 314, 317. Hence the word "person" as applied to the sovereign is used in different contexts. Identical words may be used in the same statute or even in the same section with different meanings. *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, 76 L. Ed. 1204; *Lamar* v. *United States*, 240 U. S. 60, 65, 60 L. Ed. 526, 528; *People of Porto Rico* v. *Castillo*, 227 U. S. 270, 275, 57 L. Ed. 507, 509.

(4) Definition of "person" in Section 8 of the Sherman Act does not exclude sovereign.

Section 8 of the Sherman Act defining "person" as including "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country" is a definition of inclusion which was necessary in order to avoid a too strict construc-

tion of the penal provisions of the Act. A definition of exclusion, showing expressed or implied intent on the part of Congress, would have been necessary in order to deprive the sovereign of its prerogative right to take the benefit of the remedial provisions of the Act. *Dollar Savings Bank* v. *United States, supra,* 19 Wall. 239, 22 L. Ed. 82.

The naming of the United States in those provisions of the Acts providing criminal penalties and injunctive procedure for their enforcement can scarcely be construed as an implied prohibition against the sovereign from using the remedy provided for the relief of injury to its property. Most certainly there was no implied prohibition against the sovereign States. *Marshall* v. *New York,* 254 U. S. 380, 383, 65 L. Ed. 315, 318; *In re Edges Estate, supra; Vestal* v. *Pickering, supra; Dixon* v. *United States, supra.*

(5) Supplemental Legislation recognized the rule.

The provision of Section 16 of the Clayton Act that "nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier * * *" amounts to a recognition that the United States could avail itself of remedies granted persons, firms, corporations or associations.

When the Court cites the provision of the Clayton Act (Sec. 5) stopping the running of statutes of limitations in respect to each and every private right of action, the use of the words "private right of action" is significant only because statutes of limitations do not run against the sovereign, and therefore it was unnecessary to stop the statute as to rights of action vested in the sovereign. *United States* v. *Whited,* 246 U. S. 552, 62 L. Ed. 879; *Stanley* v. *Schwalby, supra.*

(6) Judicial expression not persuasive.

The considerable body of judicial expression referred

to by the Court does assert that Section 7 of the Sherman Act affords an individual a civil action for treble damages, but to construe those cases as holding that the United States cannot avail itself of the benefit of that section, when the question was not presented, carries construction beyond the safety zone of reason.

(7) Legislative history not persuasive.

The legislative history of the Sherman Act is inconclusive. The rewriting by Senator Hoar of the original draft of the bill and his elimination of Section I with its provision for civil suits by the United States, is significant only if we presume that Senator Hoar and Congress were not familiar with the rule that the sovereign may take the benefit of any act, although not named.

B. Importance of question and division of opinion authorizes re-examination of *Cooper* case.

In view of the importance of the question involved in which all of the States have similar interests, the close division by which the decision was reached, and the fact that it was not considered by a full bench, petitioner respectfully requests a review and reconsideration of the decision of this Court in the case of *United States* v. *Cooper Corp.*, *supra*. See *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 390, 81 L. Ed. 703, 707; *Helvering* v. *Hallock*, 309 U. S. 106, 119, 84 L. Ed. 604, 612.

Summary.

In an effort to comply with rule 38 (2) of this Court requiring conciseness in the supporting brief, petitioner has not advanced all of the argument which will be urged if this petition is granted. Petitioner believes and strongly urges that the means provided in the anti-trust acts for their enforcement by the United States were not intended as remedies, the granting of which constituted implied pro-

hibitions against the United States from pursuing the remedies afforded persons who are injured in their property by a violation of the anti-trust laws. Certainly there is no implied prohibition against the States. It does not constitute policy-making to apply those rules of construction which petitioner believes should be applied to the remedial provisions of the statutes, consistent with the broad conceptions of public policy which led to their passage.

Respectfully submitted,

ELLIS ARNALL,
Attorney General of Georgia,
Counsel for Petitioner.

APPENDIX.

Act of October 15, 1914, Ch. 323, Sec. 16, 38 Stat. 730, 737, 15 U. S. C. 26.

"That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue; Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 872

THE STATE OF GEORGIA
Appellant

V.

HIRAM W. EVANS
JOHN W. GREER, JR.
THE AMERICAN BITUMULS COMPANY
THE SHELL OIL COMPANY, INC.
EMULSIFIED ASPHALT REFINING CO.
Appellees

BRIEF FOR APPELLANT

ELLIS G. ARNALL, Attorney General
E. J. CLOWER, Assistant Attorney General

WILLIAMS PTG. CO.-ATLANTA

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BRIEF ON BEHALF OF APPELLANTS

REFERENCE TO REPORT OF OPINIONS IN COURTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed in 123 Fed. 2nd, 57. (Advance sheet No. 1, December 8th, 1941.)

STATEMENT OF JURISDICTION

(1) This court has jurisdiction to decide the questions herein involved by virtue of Judicial Code,

Section 240, as amended by the Act of February 13th, 1925, 43 Statutes 938, 28 U. S. C. Section 347 (a).

(2) This court granted the writ of certiorari on March 2nd, 1942.

STATEMENT OF THE CASE

The appellant brought a civil action in the District Court of the United States for the Northern District of Georgia, Atlanta Division, seeking a judgment against appellees in the principal amount of $384,-081.39. The allegations of the complaint, briefly summarized, were as follows: Appellees entered into a combination or conspiracy having for its purpose the restraint of trade in emulsified asphalt shipped in interstate commerce into the State of Georgia, and the control of prices and the elimination and suppression of competition in respect to such commodity among the appellees and between the appellees and their competitors and prospective competitors. In pursuance of such conspiracy, appellees monopolized and attempted to monopolize trade in respect to such commodity. Appellee Hiram W. Evans, personally, or in behalf of the Southeastern Construction Company, a partnership organized by Evans, entered into an agreement and conspiracy with each of the corporate appellees, who were engaged in the business of manufacturing emulsified asphalt outside of the State of Georgia, and selling the same within the State of Georgia, the asphalt moving into the State in interstate commerce, (their business constituting more than 90% of all emulsified asphalt sold in the State of

Georgia), the terms of the agreement and conspiracy being that all sales in the State of Georgia of emulsified asphalt manufactured by said companies were to be handled by Evans. Each company was to submit bids to the State Highway Department of Georgia at prices directed by Evans, who was to receive a commission or other compensation on each sale. The appellees, together with divers other persons, caused the specifications and standards of emulsified asphalt to be purchased by the State Highway Department to be changed so that only the emulsified asphalt manufactured by the appellee companies and handled and sold by Evans would be acceptable. Appellee John W. Greer, Jr., acting in his capacity as purchasing agent for the State Highway Department, and in conspiracy with Evans, and in furtherance of the combination and conspiracy between appellees, notified the other appellees of the change in specifications and refused to so notify competitors and prospective competitors of the appellees. During the period covered by the complaint, after the notice of change in specifications, Greer notified the appellees of the proposed purchases of emulsified asphalt by the State Highway Department and refused to notify competitors and prospective competitors of the appellees, rejecting all bids submitted or attempted to be submitted by competitors or prospective competitors of the appellees, whether such bids were lower than the bids submitted by the appellees or not. When, as a result of an invitation to bid, submitted by a subordinate of Greer to another manufacturer, without Greer's knowledge or consent, such manufacturer submitted a bid lower than those submitted by the

appellees, and efforts to cancel this invitation had proved futile, Greer, acting in collusion with Evans and in furtherance of the conspiracy between appellees, divided large orders of emulsified asphalt into numerous small orders of less than $500.00 each for the purpose of awarding the small orders to Evans without receiving the competitive bids required by law and by custom upon orders in excess of $500.00, the smaller orders being awarded at a price fixed and agreed upon by the appellees.

As a result of the conspiracy of appellees and their actions in pursuance thereof, the appellant was injured and damaged in its property in the actual amount of $128,026.95.

The complaint was brought in two counts, the first alleging a violation of the Act of July 2, 1890, Ch. 647, Sec. 1; 26 Stat. 209; U. S. C. Title 15, Sec. 1; the second alleging a violation of the Act of July 2, 1890, Ch. 647, Sec. 2; 26 Stat. 209; U. S. C. Title 15, Sec. 2. (Printed record, pp. 1-26.)

Upon separate motions, the respondents sought to have the complaint dismissed on the ground that the State of Georgia was not a "person" upon whom a right of action for treble damages was conferred by Section 7 of the Act of July 2nd, 1890, or Section 4 of the Act of October 15th, 1914. (R. 27-34.)

The District Court sustained the motions to dismiss and on July 31st, 1941, entered separate judgments dismissing the complaint against each of the respondents. (R. 34.)

An appeal was prosecuted to the Circuit Court of Appeals and on October 30th, 1941, that court

entered a judgment affirming the judgment of the District Court. (R. 42; 123 Fed. 2nd, 57.)

The petition for rehearing was filed November 17th, 1941. (R. 43.) Was entertained and was denied December 15th, 1941. (R. 47.) The mandate was stayed. (R. 49.)

THE QUESTION PRESENTED

Whether the State of Georgia when it has been injured in its property by reason of a violation of Sections 1 and 2 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. 1 and 2, may maintain a civil action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 731, 15 U. S. C. 15.

STATUTES INVOLVED

Section 7 of the Act of July 2, 1890, Ch. 647, 26 Stat., 209, 210, provides:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 of the Act of July 2, 1890, Ch. 647, 26 Stat. 210, 15 U. S. C. 7 provides.

> "That the word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations existing under or

authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15, provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 1 of the Act of October 15, 1914, Chapter 323, 38 Stat. 730, provides in part:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that 'Anti-trust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890: * * *."

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In affirming the judgment of the District Court.

(2) In holding that the case was controlled by the decision of the Supreme Court in *United States v. Cooper Corp.*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667.

(3) In applying the reasoning of the court and the conclusion reached in the case of *United States v. Cooper Corp.*, 312 U. S. 60, 61 Sup. Ct. 742, 85 L. Ed. 667, to a case in which a State and not the United States seeks to maintain an action for treble damages under Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

(4) In failing to hold that when it has suffered injury to its property by reason of a violation of Sections 1 and 2 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 15 U. S. C. 1 and 2, the State of Georgia is a "person" for the purpose of determining whether it may maintain an action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

(5) In construing the word "person" in that portion of Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, affording a right of action for treble damages to "any person" as excluding the State of Georgia.

(6) In failing to hold that a State is entitled to maintain an action for treble damages under Section 7 of the Act of July 2, 1890, and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

ARGUMENT AND CITATION OF AUTHORITIES

I.

The word "person" as used in the statute includes the State as a sovereign.

1. *U. S. vs. Cooper Corp.* is not binding as a precedent.

After the State of Georgia filed its complaint, but before the issues raised by the motions to dismiss were heard, the Supreme Court decided the case of U. S. vs. Cooper Corporation, 61 Sup. Ct. (Advance Sheets) 742, in which it was held, by a four to three decision, that the United States was not a "person" within the meaning of Section 7 of the Sherman Act authorizing the action for treble damages. The district court considered itself bound by the reasoning as well as by the result of the Cooper case, and applying this reasoning to the facts of the instant case, sustained the motions to dismiss.* In this the court erred. Likewise, upon appeal the Circuit Court also felt itself so bound, and affirmed the judgment of the District Court dismissing the complaint.

It is unnecessary to here discuss the many and fundamental differences between the United States and the sovereign states. It is sufficient for the purposes of this argument to say that under the facts before the court in the Cooper case, the United States Government sought to maintain the action. The arguments used in stating the opinion of the court must be referred to the subject before it and construed in connection with the question to be decided.

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*"The reasoning in this decision is equally applicable to this case where the State of Georgia is plaintiff, and under authority of this case, which of course is controlling here, IT IS ORDERED AND ADJUDGED that said motion be, and same hereby is sustained and said action against this movant dismissed." (Printed Record p. 34).

Moorewood vs. Enequist
64 U. S. 491, 16 L. ed. 516.

Where the specific question does not appear to have been raised the court does not consider itself bound by the view expressed in the earlier case.

Cross vs. Burke
146 U. S. 82, 36 L. ed. 896.

A prior case decided by a closely divided court is authority only for its own facts.

U. S. vs. Kennesaw Mountain Battlefield Association
99 Fed. 2nd 830.

Any language used by the court in the Cooper case which might be construed to include a case in which a State files a complaint under Sec. 7 of the Sherman Act is obiter dictum, and while it may be respected, ought not to control a subsequent action in which the very point is presented for decision.

Wright vs. U. S.
302 U. S. 583; 82 L. ed. 439.*
Williams vs. U. S.
289 U. S. 553, 77 L. ed. 1372.
Humphries Exec. vs. U. S.
295 U. S. 602, 79 L. ed. 1611.
Baltimore and Carolina Line vs. Redman

*"Any observations which could be regarded as having a bearing upon the question now before us would be taken out of their proper relation. The oft repeated admonition of Chief Justice Marshall: 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used,' and that if they go 'beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision,' has special force in this instance. Cohen vs. Va., 6 Wheat. 264, 399, 5 L. ed. 257, 290."

295 U. S. 654, 79 L. ed. 1636.
O'Donoghue vs. U. S.
289 U. S. 516, 77 L. ed. 1356.

The rule of stare decisis itself breaks down when there is an important question involved which has been previously decided by a closely divided court, and especially when adherence to the previous rule involves collision with prior well established doctrines.

West Coast Hotel Company vs. Parrish
300 U. S. 379, 71 L. ed. 703.
Helvering vs. Hallock
309 U. S. 106, 84 L. ed. 604.*

As pointed out in

Reflectolyte Company vs. Luminous Unit Company
20 Fed. 2nd 607,

"One ought not to be cut off under that rule until his rights have been fully adjudicated."

For these reasons the appellant has no hesitancy in questioning the reasoning of the majority justices in the Cooper case, although it is not necessary to determine whether the final result reached in that case was correct or incorrect. If the reasoning is unsound, it should not be applied to a case in which the State and not the United States is seeking to recover treble damages under Section 7 of the Sherman Act.

*Mr. Justice Frankfurter said: "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satify reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

2. The statute is remedial.

Section 7 of the Sherman Act provides that:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor . . . and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 (15 U. S. C. A. 7) provides:

"The word 'person', or 'persons', whenever used in Sections 1, 2, 3, or 15 of this chapter, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country."

In seeking to determine whether it was the intent of Congress to exclude a State from the designation, "any person" as used in Section 7 of the Sherman Act, it must first be borne in mind that this section is not a penal, but is a remedial provision. Hence the rule of liberal construction should be applied.

Shelton Electric Co. vs. Victor Talking Machine Co.
277 Fed. 433.*

*"At common law, the person injured by an illegal restraint in trade had a right of action. Standard Oil Co. vs. U. S. 221 U. S. 1, 49 to 64, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (New Series) 834, Ann. Cas. 1912D, 734; Western Union Tel. Co. vs. Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, and it is upon such unreasonable restraint that the second count of the complaint is predicated. The treble damages, which the complaint seeks to recover, are neither a penalty or a forfeiture, but merely treble damages allowed by the law for the redress of a private injury. Chattanooga Foundry Co. vs. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65 51 L. Ed. 241."

Chattanooga Foundry and Pipe Co. vs. Atlanta
203 U. S. 390, 51 L. ed. 241.*
Hicks vs. Bekins Moving and Storage Co.
87 F (2) 583.
Strout vs. U. S. Shoe Machinery Co.
195 F. 313.
Brady vs. Daly
175 U. S. 148, 44 L. ed. 109.
James-Dickinson Farm Mortgage Co. vs. Harry
273 U. S. 119, 71 L. ed. 569.

(a) Remedial statutes liberally construed.

It is well settled that a remedial statute is to be liberally construed in order to effectuate the purpose which Congress had in view in enacting it.

Farmers and Mech. Nat'l. Bank of Buffalo vs. Dearing
91 U. S. 29, 23 L. ed. 196.
Grand Trunk Railway Co. of Canada vs. Richardson
91 U. S. 454, 23 L. ed. 356.
Stewart vs. Kahn
78 U. S. 493, 20 L. ed. 176.
U. S. vs. Wiley,
78 U. S. 508, 20 L. ed. 211.

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*When this case was in the Circuit Court for the Eastern District of Tennessee, the court said:

"The great disproportion between these sums and the maximum limit of the fine imposed by Section 3 is a circumstance admitting of no rational explanation, if the damages recovered under Section 7 must be regarded as a penalty inflicted as punishment, like the fine imposed under Section 3. These and other characteristic points of difference between penal and remedial actions support the conclusion arrived at that these actions are remedial and compensatory only." (101 Fed. 900.)

Galveston, Houston, Henderson Railroad Co. vs. Cowdray
78 U. S. 459, 20 L. ed. 199.
Miller vs. Robertson
266 U. S. 243, 69 L. ed. 265.*

While the Anti-Trust Acts of the United States are penal as to certain of their provisions, this does not affect the liberal construction which should be given the remedial provisions of the same acts. So, in

Farmers and Mech. Nat'l Bank of Buffalo vs. Dearing, supra,

the court said:

"The 30th section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it. Gray vs. Bennett, 3 Met. 522, 529."

And, to the same effect see

Murphy vs. St. Louis-San Francisco R. Co.
226 S. W. 637, 205 Mo. App. 682.

3. The fallacy in the reasoning in the Cooper case.

(a) Remedial statutes include the sovereign although not named.

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*Mr. Justice Butler, speaking for the court, said:
"The purpose of Section 9 was to prevent or lessen losses and inconvenience liable to result to nonenemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered. U. S. vs. Anderson, 9 Wall. 56, 66, 19 L. ed. 788, 790. The just purpose of the section is not to be defeated by a narrow interpretation, or by unnecessarily restricting the meaning of the word within technical limitations. U. S. vs. Freeman, 3 How. 556, 565, 11 L. ed. 724, 728; Danciger vs. Cooley, 248 U. S. 319, 326, 63 L. ed. 266, 269, 39 Sup. Ct. Rep. 119; U. S. ex rel. French vs. Weeks, 259 U. S. 326, 328, 66 L. ed. 965, 969, 42 Sup. Ct. Rep. 505."

Bearing in mind the liberal construction which must be given statutes intended to be remedial in their effect, we now turn to a consideration of whether it was the Congressional intent that a State should be excluded by the use of the word "person" in Section 7 of the Sherman Act under which the appellant seeks to derive its right to maintain the present action. And since this Court in the Cooper case has held the United States not to be a "person" within the provisions of that section, it becomes necessary to examine that decision in an effort to see if the same reasoning should be applied to a case where a sovereign State brings the action.

It is respectfully submitted that in the beginning of its opinion in the Cooper case the court assumes an unsound premise in asserting "since, in common usage, the term 'person' does not include the sovereign, statutes employing that term are ordinarily construed to exclude it." In support of this statement the court cites.

In Re Fox
52 N. Y. 530,

and

United States vs. Fox
94 U. S. 315,
24 L. ed. 192.

The question presented in the Fox cases was the right of the United States to acquire by devise real property located in New York where the statute of that State provided that a testator might devise his lands "to every person capable by law of holding real estate, but no devise to a corporation shall be filed, unless such corporation be expressly author-

ized by its charter or by statute to take by devise." It was pointed out that the language of the statute was substantially adopted from the English Statute of Wills and became a part of the law of New York upon the adoption of the Constitution of 1777. At that time, of course, the term "person" could not have embraced the United States since the United States was not in existence. The New York Court said:

> "But no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a State or a nation. Its meaning may be extended by express definition so as to include a government or sovereign."

Thus it was not upon authority but rather upon lack of authority, or perhaps lack of diligence, that the State court held the word "person" did not embrace a government or sovereign. The United States Supreme Court, when the case was appealed, holding the several States possess the power to regulate the tenure of real property within their respective limits, simply followed the New York Court and cited no additional authority.

The authority which the New York Court failed to discover was fully discussed by Mr. Justice Fuller in writing the opinion for the court in the case of

Stanley vs. Schwalby
147 U. S. 508
37 L. ed. 259.

The question presented there was as to the right of the United States to take the benefit of a statute of limitations of the State of Texas which provided

that every suit to recover real estate "as against any person in peaceable and adverse possession thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards." The court said:

> "But, as observed by Mr. Justice Strong, delivering the opinion of the court in Dollar Savings Bank vs. United States, 86 U. S. 19 Wall. 227, 239 (22: 80, 82), while the king is not bound by any act of Parliament unless he be named therein by special and particular words, he may take the benefit of any particular act though not named. And, he adds, that the rule thus settled as to the British Crown is equally applicable to this government; and that so much of the royal prerogative as belonged to the king in his capacity of parens patriae or universal trustee, enters as much into our political state as it does into the principles of the British constitution. The general rule is stated in Chitty on the Law of the Prerogatives of the Crown, 382, clearly to be 'that though the king may avail himself of the provisions of any acts of Parliament, he is not bound by such as do not particularly and expressly mention him.' 'For it is agreed in all our books that the King shall take benefit of any act, although he be not named.' Coke 32a; 11 Coke, 68b; 1 Leon. 150; 1 Bl. Com. 262. . . . . It was in view of the ancient rule and its derivation that the Supreme Court of Wisconsin, in Baxter vs. State, 10 Wis. 454, held that while the statute cannot be set up as a defense to an action by the government, this rule being founded upon the public good and the protection and preservation of the public interest; instead of furnishing any support for the position that as a defendant the State could not

have the benefit of the statute, would fully sustain the opposite conclusion. And so, in People vs. Gilbert, 18 Johns. 227, it was pointed out by way of illustration that the same rule of construction applied to the statute concerning costs, which the State may recover, though not obliged to pay them because not included in the general terms of the statute. It is obvious that the ground of the exemption of governments from statutory bars or the consequences of laches has no existence in the instance of individuals, and we think the proposition cannot be maintained that because a government is not bound by statutes of limitation therefore the citizen cannot be bound as between himself and the government.

"Of course, the United States were not bound by the laws of the State, yet the word 'person' in the statute would include them as a body politic and corporate, Sayles, Art. 3140; Martin vs. State, 24 Tex. 68."

The rule announced by Mr. Justice Fuller is based upon sound precedent and sound reasoning. Its alternative, as pointed out in many cases, is to place the King or sovereign, the parens patriae, in a worse position than that of its humblest subject.

Typical of these cases is Pierce vs. U. S. of America 255 U. S. 398; 65 Law Edition 697, wherein Justice Brandeis answering the contention that the United States had no right under the Elkins Act to enforce a penalty by a creditors bill, said:

"To the contention that the statute has not made this process available for the Government in enforcing a penalty, it may be answered, as was done by the King's Bench a hundred years ago, in Rex vs. Woolf, 2 Barn. and ALB. 609,

611, 106 Eng. Reprint, 488, when it was insisted that a fine due to the Crown was not a judgment debt for which execution could be levied: '. . . mischievous consequences would ensue to the Crown and the regular administration of justice, from a delinquent withdrawing all his property from the effect of a judgment; and that the preventing that will not be a mischievous consequence to anyone but himself. Here there is a judgment that the defendant do pay to the King a fine of a certain sum. By that judgment a debt becomes a debt to the King, of record; and it is payable to the King instanter . . . . . if we were to say that the Crown shall not be at liberty to issue an immediate execution for its own debt, we should place the Crown in a worse situation than any subject.' "

It will be noticed that the common law rule was:

"The king shall take the benefit of any act, although he be not named."

So, the rule was not limited to a case where the sovereign sought to avail himself of a procedural statute applying a new procedure to a pre-existing substantive right, but the sovereign was given the benefit of a statute creating a new substantive right. This is borne out not only by the early English authorities in which the rule was announced and followed, but also by the modern application of the rule. Applying this rule we are able to reconcile many of the cases in which the United States or the State has or has not been held to be a person within the meaning of that word as used in a statute.

As early as the *Queen and Buckberds Case*, 1 Leon. 149, 74 Eng. Reprints, 138, Popham, the Attorney General, said:

"The Queen ought to recover damages, but only single damages, but not double damages; And the words of the statute are general, therefore the queen shall have the benefit of it, and of all statutes made for the benefit of the subjects, the King shall take advantage: the Statute of Gloucester gives damages in a writ of cosinage, Aiel and Besail, and the King brings an action upon the seisin of his ancestors, he shall recover damages, and in construction of statutes, the opinions of them which were next to the making of them is to be much respected: vide 19 E. 2, Rot. 90, 19 E. I Rot. 255, 231, 136. And always the King counts to his damage, etc. and that should be in vain, if he should not recover damages: . . . ."

In

Lord Berkley's Case (1561, Plow 223, 243, 75 Eng. Reprints, 339, 372, Weston, Justice said:

"But yet the King, though not named in statutes, shall take advantage of them as another shall do; as he shall take advantage of the Statute of Wast. and of the Statute of 9 R. 2. Cap. 3. of Error and Attaint for him in reversion upon recovery against their tenant for life, notwithstanding he is not named in them. So if the King as heir to his mother brings a sur cui in vita, the plea shall not be delayed for the nonage of the heir of the husband, but the King shall take advantage of the statute of Westminster 2 Cap. 40. notwithstanding he is not named. And on the other hand if he is not named in a statute he shall not be restrained by it."

In

The Case of a Fine

7 Coke, 32a; 77 Eng. Reprints, 459, the facts were as follows:

"The King was informed, that divers manors

and lands were entailed to Gilbert de Clare, Earl of Gloucester, and the King who now is, is heir of the body of the said Gilbert inheritable to the said lands; some of which manors the King and others his progenitors, for good consideration, had granted to divers subjects; all which grants (as was pretended) were in respect of the said ancient estate-tail utterly void. The King that now is, of grace and good will to his subject, and for their quiet and repose, required Popham Chief Justice, and Coke Attorney-General, to consider how by law he might establish the estate of the said patentees, and others claiming under them, against the said estate-tail."

Whereupon they severally agreed unanimously:

"Forasmuch as the King is bound (a) by the Stat. de Donis Conditionalibus, as it is adjudged in Lord Berkley's case, Plow. Com. 240. By which Act the King is restrained from alienation; for it is enacted by the said Act, quod finis ipso jure sit nullus; reason requires that the King shall take benefit of the Acts of 4 (b) H. 7, and 32(c) H. S. which enables tenant in tail to bar his issues: for it is agreed in all our books that the King shall take benefit of any Act, although he be not named, 12 (d) H. 7. 21 a. 35(e) H. 6. 60. The Lord Berkley's case, Plow. Com. 240. And it would be hard that the King, being issue in tail of a gift made to a subject, should be in worse condition than if he had not been King."

Magdalen College Case, (1615) 11 Co. Rep. 66b, 68b, 1 Bl. Com. 14th Ed., 77 Eng. Reprints 1235, 1238.

In

The Queen vs. Cruise, (1852) 2 Ir. Ch. Rep. 65;

it is said:

> "I apprehend that the Crown, although not bound by the enactment in the 31st section of the former, or the 21st section of the latter Act (the word 'person' not including the Crown), may take advantage of the Acts. The general rule clearly is that, 'though the King may avail himself of the provisions of any Act of Parliament, he is not bound by such as do not particularly and expressly mention him.' The cases are referred to in Chitty on Prerogatives, page 382."

And, also

> *Attorney-General vs. Tomline*, (1880) 15 L. R., Ch. D. 150.
> *Attorney General for New South Wales vs. Curator of Interstates Estates*, (1907) A. C. 519 (L. R.).

In the case of

> *Nardone vs. United States*
> 302 U. S. 379, 82 L. Ed. 314,

the principle was summarized thus:

> "That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong." Citing, U. S. vs. Knight, 14 Pet. 301, 315; 10 L. ed. 465, 472. U. S. vs. Herron, 20 Wall 251, 263; 22 L. ed. 275, 279. Black, Int. of Laws, 2nd Ed. 97.*

In

> *Tindal vs. Wesley*
> 167 U. S. 204, 42 L. ed. 137,

*While these cases announce the principle that the sovereign is bound by the general words of a statute intended to prevent injury and wrong, this exception to the general rule itself illustrates that the question of whether a sovereign is included within the general words of a statute depends primarily upon the public interest and benefit.

the Court, speaking through Mr. Justice Harlan, in holding that the judgment in that case would not conclude the State, said:

> "But this court said: 'Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of Carr vs. U. S., 98 U. S. 433, (25:209), already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. . . ."

In

United States vs. Jacinto Tin Company
125 U. S. 273; 31 L. ed. 747,

the Court, in holding that a suit may be brought by the United States to set aside, cancel or annul a patent for land issued in its name on the ground that it was obtained by fraud or mistake, said:

> "If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual, is hardly open to argument."

And again:

> "It cannot be conceived why the Government should stand on a different footing from any other proprietor."

And yet again:

> "But we are of the opinion that since the right of the Government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the Government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter."*

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*This contention was discussed in the dissenting opinion of Mr. Justice Black in the Cooper case which was concurred in by Mr. Justice Reed and Mr. Justice Douglas as follows: "And certainly it can hardly be denied that the language of the Act, giving all persons a right of action, should if liberally construed be held to justify suit by the United States. For, in Cotton vs. United States, 11 How. 229, 229, 231, 13 L. ed. 675, decided forty years before the Sherman Act was adopted, this court said in speaking of the United States: 'Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property. . . . . It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection.' And, speaking in similar vein in Helvering vs. Stockholm Enskilda Bank, 293 U. S. 84, 92, 55 S. Ct. 50, 53, 79 L. ed. 211, after having cited Blackstone for the proposition that the sovereign is a 'corporation,' and after having gone even beyond this to hold that the statutory word 'resident' included the United States, the court said: 'This may be in the nature of a legal fiction; but legal fictions have an appropriate place in the administration of the law when they are required by the demands of convenience and justice'."

The principle announced in the foregoing cases cannot be dismissed from consideration, as the majority opinion seeks to do, by the assertion that while the United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights, the Sherman Act created new rights and remedies which are available only to those on whom they are conferred by the Act. The rules are not inconsistent and both may be applied. An action by the sovereign under Sec. 7 is one in vindication of its property rights. The rule affording the sovereign the benefit of any act does not except acts creating new rights and remedies. The cases cited by the court were not cases in which public rights, or the rights of the sovereign were involved. But even if it be considered that both rules cannot consistently be applied to the same statute, and that the application of one must exclude the other, the determining factor is pointed out in the case of

Wilder Mfg. Co. vs. Corn Products Ref. Co.
236 U. S. 165, 59 L. ed. 520,

as follows:

> "In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statutes, but the remedies which it provided, were coextensive with such conceptions."

If the United States which possesses only the attributes of sovereignty surrendered to it by the states,

is entitled to the benefit of a remedial statute, although not expressly named therein, reason dictates that the sovereign state, which possesses all of the attributes of sovereignty not so surrendered, presents a much stronger claim to this prerogative of the sovereign in the absence of a specific showing that the state was expressly excluded under the terms of the statute.

The sovereign prerogative of the crown devolved, in America, upon the states.

Fontain vs. Ravenel
17 How. 369, 15 L. Ed. 80.
Wheeler vs. Smith
9 How. 55, 13 L. Ed. 44.

In

State of Wyoming vs. U. S.
255 U. S. 489, 65 L. Ed. 742

the Supreme Court accorded to the State of Wyoming the protection of the Fifth Amendment of the United States Constitution, holding that the vesting of land in a state by a lieu selection under an act of Congress prohibited a subsequent executive withdrawal.*

(b) In Re *Fox against Weight of authority.*

The decision in In Re Fox, supra, is opposed to the great weight of authority as found in the de-

*The applicable language of the Fifth Amendment is: "'. . . nor shall any person be subject, for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'"

cisions of this court and many state courts insofar as the rights of a sovereign are involved under a remedial statute, or a statute conferring rights upon "person."

In

State Highway and Public Works Commission vs. Cobb
2 S. E. 2nd 656, 215 N. C. 556,

the Supreme Court of North Carolina said:

> "The state constitutes a sort of intangible sovereignty. Legally speaking, it cannot be assaulted, slandered, or injured as an individual with respect to a personality that it does not possess. But it does own property and has property rights which might be the subject of invasion. If a wrong is committed against it in the nature of a tort, it must be with respect to such a right."

In

State vs. Dunniway
128 Pac. 853, 63 Ore. 555,

the Supreme Court of Oregon in holding that a state could maintain an action in ejectment under the statutes of that state said:

> "That section of the Code is broad enough to include the state. The words 'any person,' specifying who may bring the action, were intended and are broad enough to include artificial as well as natural persons. Endlich on Interpretation of Statutes, Sections 87, 89; Chapman vs. Brewer, 43 Neb. 890, 898, 62 N. W. 320, 47 Am. St. Rep. 779; State v. Woram et al., 6 Hill, 33, 38, 40 Am Dec. 378; People v. Utica Ins. Company, 15 Johns. 358, 8 Am. Dec. 243."

In

Vestal vs. Pickering
267 Pac. 821, 125 Ore. 553,

The Supreme Court of Oregon said:

"It cannot be questioned that the State is competent to become the beneficiary of a last will and testament unless there is a statute prohibiting the State to exercise that power. There is no statute prohibiting this State from receiving property by will. It has been held that the United States Government, which is a government of limited power, is capable of receiving property by will unless prohibited by statute. Compare Dixon vs. U. S., 125 Mass. 311; 28 Am. Rep. 230, with U. S. vs. Fox, 94 U. S. 315, 24 L. ed. 192, affirming In Re Fox, 52 N. Y. 530, 11 Am. Rep. 751."

In the same connection, see

In Re Edges Estate
14 Atl. 2d. 293; 339 Pa. 67
Lenjerr vs. Feldman
202 Pac. 624; 110 Kan. 115.*

In the case of

Kansas vs. Herold
9 Kan. 194;

The Supreme Court of Kansas held:

"The United States is a 'person' within the meaning of Section 1 of the 'Act to prevent certain trespasses,' which makes it an offense for any person to cut down, injure or destroy, or take or remove any trees, timber, rails or wood,

*The statute of wills of Kansas provides for a devise to "any person." Compare this case with In Re Fox, supra.

'standing, being or growing on the land of any other person.' etc."

In the case of

Martin vs. The State
24 Texas 61,

The Supreme Court of Texas said:

"It is contended, that the offense charged in this indictment, is not embraced within the provisions of the 33rd section of the Act of the 20th of March, 1848, because that section punishes the false making, or fraudulent alteration of a public record, only when it is done 'with intent that any person may be defrauded.' It is said, that the section does not reach the case of a fraudulent alteration, or false making of a public record 'with intent to defraud the State;' but we think the State must be taken to be a 'person,' within the meaning of the statute."

It should be pointed out here that in the two cases last cited the courts were construing criminal statutes, which under the well settled rules of construction, must be strictly construed.

In

State of Indiana vs. Woram
6 Hill 33, 40 Am. Decisions 378,

the New York Court said:

"Our statute is, that 'all notes in writing made and signed by any person, whereby he shall promise to pay to any other person, or his order,' etc., shall be negotiable, etc.; and that 'the word "person" in the last two preceding sections shall be construed to extend to every corporation capable by law of making contracts: '1 R. S. 768, Section 1-3. It did not require the aid of the

legislature to prove that the word person in a statute may extend to a corporation as well as to a natural person: The People vs. Utica Ins. Co. 15 Johns, 358 (8 Am. Dec. 243). That a state is a corporation can not be doubted. It is a legal being, capable of transacting some kinds of business like a natural person, and such a being is a corporation. The People vs. Assessors of Watertown, 1 Hill, 620. I see no reason for doubt that a state may be the payee of a promissory note."

In

State vs: Odd Fellows Hall Association
243 N. W. 616, 123 Neb. 440,

the Supreme Court of Nebraska in holding that a state was included within the language of a statute of that state relating to the appeal of "any person," said:

"This is but a legislative recognition of the general rule that 'a state . . . may be regarded as a person in law, and as such may be recognized by the courts as a party plaintiff.' 47 C. J. 19.

" 'It (a state) is an artificial person. It has its affairs and its interests: it has its rules: it has its rights: and it has its obligations. It may acquire property, distinct from that of its members.' Chisholm vs. Georgia, 2 Dall. 419, 455, 1 L. ed. 440. So, in the sense of the defined terms of our revenue act, 'state' is not only embraced in the term 'person' as implied therein, but is likewise within the term of the descriptive language, 'any other entity [a real being, whether in thought (as an ideal conception)

or in fact. Webster's New Int. Dic.] that may be the owner of property."

In

State vs. General American Life Ins. Company 272 N. W. 555, 132 Neb. 520,

it appeared that the Nebraska statute provided that "any person" may have any legal question determined under the uniform declaratory judgment act. The court pointed out that the act was remedial and therefore was to be liberally construed and administered. It held that the word "person" as used in the declaratory judgment act included the State so as to authorize the State on relation of the State Insurance Director to maintain an action for a declaratory judgment. See also,

Longview Company vs. Cowlitz County
95 Pac. 2nd 376; 1 Wash. (2) 64.

Buffalo vs. Beppinger
76 N. Y. 393;

Buffalo Cement Company vs. McNaughton
156 N. Y. 702, 51 N. E. 1089, 35 N. Y. Sup. 453.

(c) Use of a word in one portion of an act does not necessarily fix its meaning when used in another portion.

If the ruling announced in the foregoing cases be correct; that is, that Section 7 of the Sherman Act is a remedial provision; that a remedial provision in a statute must be liberally construed in order to effectuate its purpose; and that the soverign is entitled to participate in the benefit of remedial stat-

utes although not specifically named therein, then much of the reasoning of the majority opinion in the Cooper case breaks down. The word "person" construed in its ordinary and natural sense in a statute granting a remedy to "any person" would include the sovereign. So the logical approach to the question of whether the state is included in the language of an act giving all persons a right of action is to determine whether there is any evidence of an intent on the part of Congress to exclude the State.

Davis vs. Pringle
268 U. S. 315, 69 L. ed. 974.

See also the dissenting opinion in the Cooper case.*

It should require strong evidence of such congressional intent to change or create an exception to this well established principle of law. No such evidence is presented in the majority opinion in the Cooper case as applicable to a state. But where the word "person" is used in the penal provisions of a statute, its ordinary and natural sense would not include the sovereign. So the word "person" may be used with different meanings in the same statute and the use of the word in one portion without extension or qualification does not necessarily fix its meaning when used in another portion of the same act.

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*"These particular cases are but facets of a general rule that has long been accepted—the United States can exercise all of the legal remedies which other persons, bodies or associations can exercise, both at common law and under statutes, unless there is something in a statute or in its history to indicate an intent to deprive the United States of that right."

Atlantic Cleaners and Dyers vs. United States 286 U. S. 427, 76 L. ed. 1204.*
Lamar vs. United States
240 U. S. 60, 60 L. ed. 526;
People of Porta Rica vs. Costillo
227 U. S. 270, 57 L. ed. 507.

We cannot assume then as does the majority opinion, that the word "person" as used in the penal provisions of the anti-trust law should bear the same construction as it does when used in the remedial provisions. Where the court points to other provisions of the Sherman and Clayton Acts in which the word "person" is used in a sense which would not include the United States, it fails to point to that portion of the Clayton Act providing injunctive relief for "any person, firm, corporation, or association . . ." which reads:

"Provided, that nothing herein contained shall be construed to entitle any person, firm, corpora-

*"Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute, or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same Act are intended to have the same meaning. Courtauld vs. Leth, L. R. 4 Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act, with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed and of the circumstances under which the language was employed."

> tion, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier . . ."

Certainly, if it was necessary to use the language "except the United States" in order to remove the United States from the purview of its classification as a "person, firm or corporation," it is self evident that in certain portions of the Act the term "person" was used in a broad and inclusive sense—embracing the sovereign unless specifically excluded.

(d.) The policy of the act was not to exclude the State from any remedy.

Where the court pointed out in the Cooper case that it considered the policy of the act to give "two classes of actions,—those made available only to the Government, which are provided in detail, and, in addition, a right of action for treble damages granted to redress private injury," we are forced to inquire if it was the policy of the act to discriminate against the states, one of the largest class of purchasers, and to eliminate them from any remedy whatsoever. As to the United States, the argument is forcibly answered in note 3 of the dissenting opinion. But the state is nowhere specifically mentioned in the act. If the construction adopted by the majority opinion be correct, and if it be extended to apply to the State, the State has no remedy by criminal prosecution; it has no remedy by injunction; it has no remedy by civil action to redress its injury; it has no remedy whatsoever. It is subject to injury by wrongdoers and to repeated injury without redress. Could this have been the policy of Congress in adopting the anti-trust legislation? Could Congress have intended

its legislation to be interpreted in a way that would produce an unreasonable or unjust result?

U. S. vs. American Trucking Associations
310 U. S. 534, 542, 543, 84 L. ed. 1345;
Sorrells vs. U. S.
287 U. S. 435, 446, 77 L. ed. 413.

(e) Criticism of the other sources looked to by the Court as an aid to construction.

Where the majority opinion cites other acts which impose penalties upon "persons;" which use the word in a provision of an act which, like Section 7 of the Sherman Act, authorizes a civil action for the recovery of treble damages; or which use the word "person" in a situation clearly not applicable to the sovereignty, the argument becomes strained and almost specious. The sovereignty can not be divested of its rights without a clearly expressed intention, and the application of a penalty to the sovereign will not be presumed; a word cannot be defined by the use of the same word; language used in a connection which it would be unreasonable to apply to the sovereign should not be so applied. Thus Section 77 of the Wilson Tariff Act uses the exact words of Section 7 of the Sherman Act and is not persuasive, therefore, in support of the argument of the majority opinion. The same is true with the Revenue Act of 1916, although it might also be observed in this connection that it is difficult to see how the United States could be damaged in its business or property by a violation of the terms of that act. And where the majority opinion cites the provision of the Clayton Act which provides for the stopping of the running of the statute of limitation in respect to each

and every private right of action, we can logically assume (which the majority justices seem to have overlooked) that Congress recognized the rule long since established by this Court that statutes of limitation do not run against the sovereign and therefore legislation was not necessary to stop the statute with reference to a right of action vested in the sovereignty.

The "considerable body of judicial expression to the effect that Section 7 authorizes an action for damages only by private suitors" bears no weight since, as pointed out by the court, "none of the cases presented the exact question here involved."

Where the majority opinion points out that Senator Hoar rewrote most of the original act, eliminating Section I with its provision for civil suits by the United States, may we not conclude that Senator Hoar was familiar with the rule announced in the cases hereinbefore cited which would include the State and even the United States within the designation "person" when used in a remedial statute. As pointed out by Judge Clarke of the Circuit Court in the dissenting opinion in U. S. vs. Cooper Corporation, 114 Federal 2d 414,

> "The exhaustive study of contemporary congressional debates relied on by the court below, D. C. S. C. N. Y. 31 F. Sup. 848, 851, and offered to us here appears inconclusive; neither Senator Sherman, who presented a first draft, nor Senator Hoar, who drafted the final act, appear to have given public consideration to the matter here involved. 35 Ill. L. Review, 223."

Certainly, public consideration was never given to

the right of a State to institute civil action for treble damages.

Argument that previous Attorney Generals had failed to bring a civil action for treble damages on behalf of the United States is not more conclusive than an argument that one Attorney General did institute such an action, unless it be shown that each of the previous Attorney Generals who failed to act were cognizant of cases in which a violation of the anti-trust laws had operated to the injury of the business or property of the United States. Unless there be shown specific instances where a state has been injured by a violation of the anti-trust laws, and many such instances, the failure of any state to institute such an action bears no weight in construing an Act of Congress. Nor could the administrative interpretation of any state have any weight in construing congressional statutes.

Where the statute defines "person" as including "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country" it must be remembered that these are words of inclusion, not exclusion. Since the statute is penal in part, and since it had not been conclusively adjudicated at the time of its passage that a corporation was a person,* words of inclusion were necessary in order to avoid a too strict construction of its penal provisions. But since the statute is also remedial in part and that part is to be liberally construed, words of positive exclusion were essential had Congress intended to

*This question is discussed in 35 Ill. L. Review 223.

exclude the State or the United States from participating in its benefits.

II.

If the word "person" as used in the statute excludes the sovereign, the State may yet maintain an action.

The foregoing discussion has been for the primary purpose of showing that the phrase "any person" as used in the provisions of the anti-trust laws affording a right of action for treble damages is broad enough to include the state as a sovereign. However, whether that phrase be so construed or whether it be limited to private rights of action, the State would be entitled to maintain the action. The State of Georgia has effectively divested itself of its sovereignty with reference to that phase of interstate commerce dealt with in the anti-trust legislation and is relegated to the status of a private individual.

A state may divest itself of its sovereignty in vairous ways. For the purpose of this discussion, however, it will be sufficient to deal with the accomplishment of that result by complainant by its entering into compacts with other states, and by assuming to act in a proprietary capacity under its own legislation.

1. The sovereignty of the State no longer exists with reference to the U. S. Anti-Trust Acts because they apply only to interstate commerce.

The State of Georgia has entered into a compact with other states of the Union by which it has divested itself of its sovereignty with regard to certain

powers and surrendered those powers to the United States.

Chisholm vs. Georgia
2 Dall. 419, 1 L. ed. 440.*
Tennessee vs. Davis
100 U. S. 257, 25 L. ed. 648.**
Cohen's vs. Virginia
6 Wheat. 264, 5 L. ed. 257.

The right of the State of Georgia to withdraw from the compact into which it entered was settled as early as 1865. See

Texas vs. White
74 U. S. 700, 19 L. ed. 227.

By Article 1, Section 8 of the Constitution of the United States, Congress is given power "to regulate commerce with foreign nations, and among the sev-

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**"The United States are sovereign as to all the powers of government actually surrendered." Again, "When sovereigns are sued in their own courts, such a method may have been established as the most respectful form of demand; but we are not now in a State court; and if sovereignty be an exemption from suit in any other than the sovereign's own court, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."

*"But when the National Government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered, the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. The judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State."

eral states, and with the Indian tribes." In prescribing the rules and regulations to govern interstate commerce, Congress is supreme.

Addyston Pipe and Steel Co. vs. United States 175 U. S. 211, 44 L. ed. 136;
Northern Securities Co. vs. United States 193 U. S. 197, 48 L. ed. 679.

No state may in anywise enact legislation which in any way controls, regulates or infringes on interstate commerce.

Northern Securities Co. vs. United States, supra.
Southern Railway Co. vs. King 217 U. S. 524, 54 L. ed. 368.*
West vs. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716;
United States vs. International Harvester Co. 214 Fed. 987.

Since Congress has dealt with that feature of interstate commerce regulated under the anti-trust acts, no state statute can authorize the performance of an act that the anti-trust acts forbid. Within the scope of those acts, they are supreme.

United States vs. Reading Company 226 Fed. 229.**

*"It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The states cannot pass any law directly regulating such commerce. Attempts to do so have been declared unconstitutional in many instances, and the exclusive power in Congress to regulate such commerce uniformly maintained."

**"The Federal law is supreme in the field of interstate and foreign commerce and the law of a state cannot authorize its citizens, either individual or corporate, to violate a constitutional act of Congress."

Affirmed 253 U. S. 26
40 Sup. Ct. 425.

Citing

Philadelphia B. & W. Oil Co. vs. Shubert
220 Sup. Ct. 589, 56 L. ed. 911.

See also

United States vs. Hall
248 U. S. 420, 63 L. ed. 337;
Truax vs. Corrigan
257 U. S. 312, 66 L. ed. 254.

But, although the State has divested itself of its sovereignty with reference to the power to control or regulate interstate commerce, and especially with reference to that portion of interstate commerce regulated under the anti-trust acts, the State still has the capacity of a "person" to be injured in its business or its property by a person who violates the anti-trust laws. As stated in the Chisholm case, supra,

> "By a state I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: it has its rules: it has its rights: and it has its obligations. It may acquire property distinct from that of its members . . . if one free man, an original sovereign, may do all this, why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished, the dignity of all jointly must be unimpaired."

The Constitution of the United States acts upon the States in their corporate capacity as well as upon individuals.

Martin vs. Hunters Lessee
1 Wheat. 304, 4 L. ed. 97, 107.

The States, while bound by the Constitution of the United States are also protected by it.

The State of Wyoming vs. United States, supra.
Pennsylvania vs. West Virginia
262 U. S. 553, 67 L. ed. 1117.*

In

Tirrell vs. Johnston
171 Atl. 641; 86 N. H. 530,

affirmed by the Supreme Court of the United States in 293 U. S. 533, the Supreme Court of New Hampshire, in holding a federal rural mail carrier furnishing his own automobile liable for the gasoline road toll imposed for the general use of state roads, said:

> "To put it in everyday phrase, it is a claim that the general government should pay for what it wishes to buy or use. Vast as the powers of the general government are, they do not include a right to confiscate where there is no offense. It cannot appropriate the property of a state, any more than it can quarter soldiers upon the individual citizen in times of peace.

*"By the Constitution, Article I, Section VIII, Clause III, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it."

"These conclusions do not depend upon any theory of state sovereignty. They result from a denial of national absolutism. They are not maintained upon a plea that a state is clothed with rights or endowed with powers peculiar to itself. That feature of our dual form of government is put aside. That a state is an entity, entitled to the fundamental rights, privileges, and immunities belonging to every legally recognized entity, is all that is here claimed. Nothing is demanded on behalf of the states which would not be granted without question at the behest of the humblest citizen."

If there be any distinction between the protection afforded to States and to individuals under the Constitution and laws of the United States in cases where the States have ceded their sovereignty to the United States, that distinction is only to afford greater protection to the State as a quasi sovereign than to an individual and to allow the State to sue in its capacity of quasi sovereign in some instances when specific relief would not be accorded to a private party. So, in

Georgia vs. Tennessee Copper Company
206 U. S. 230, 51 L. ed. 1038,

it was said:

"When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interest; and the alternative to force is a suit in this court. Missouri vs. Ill., 180 U. S. 208, 241, 45 L. ed. 497, 512, 21 Sup. Ct. Rep. 331.

"Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped."

Of course it must appear that the State has suffered a wrong furnishing a ground for judicial redress or is asserting a right susceptible of judicial enforcement.

Florida vs. Mellon
273 U. S. 12, 71 L. ed. 511.

However, at common law, the person injured by an illegal restraint in trade had a right of action.

Shelton Electric Co. vs. Victor Talking Machine Co., supra.

It may well be inquired whether the State in ceding to the United States full power and control over interstate commerce, agreed to submit to an injury to its property or business resulting from a monopoly or combination in restraint of such commerce and trade and to be required to relinquish its right to redress arising from such injury. In such cases, the State as trustee for its citizens is somewhat more certainly entitled to specific relief than a private party might be and to all of the remedies afforded to an individual.

2. The State of Georgia has assumed the status of an individual by its own actions.

A State may specifically divest itself of its sovereignty by its own legislation under which it assumes to act in a proprietary capacity.

Bank of the United States vs. Planters Bank of Georgia, 9 Wheat. 904, 6 L. ed. 244;
Davis vs. Gray
83 U. S. 203, 21 L. ed. 447;
Murray vs. City Council of Charleston
96 U. S. 432, 24 L. ed. 760;
Hall vs. Wisconsin
103 U. S. 5, 26 L. ed. 302.

The State of Georgia has not only given up its sovereignty with respect to that part of interstate commerce regulated by the anti-trust laws through entering into a compact with other states, but it has also, by statutory enactment, assumed the status of a private individual in bringing suit "with the same rights as any citizen" for debts due the State, including the recovery of that amount of which it has been defrauded. See Section 91-405 of the Georgia Code of 1933.*

Alexander vs. The State of Georgia
56 Ga. 479.**

Thus the State has done everything in its power to assume the status of a private individual. It has

*"Whenever the Governor, after consulting with the Attorney-General, shall deem it proper to institute a suit for the recovery of a debt due the State or money or property belonging to the State, he is authorized and required to institute such suit in the proper court of this State, with the same rights as any citizen, and to require the aid of the Attorney General to begin and carry on such suits."

**"The Governor has authority to institute suit for the recovery of money of which the State has been defrauded, under the general power granted to him of supervising the property of the State."

divested itself of its sovereignty. It has retained the right to make contracts, to trade, to purchase commodities shipped in interstate commerce. It has the capacity to be injured by persons violating the anti-trust laws. It has authorized the Governor to institute suit for the recovery of a debt due the State or money or property belonging to the State. Under the general power granted the Governor of supervising the property of the State the Supreme Court of Georgia has held that he, like any private citizen, can institute suit in cases where the State has been defrauded of its property. This statutory enactment of the General Assembly and judicial construction of the Supreme Court of Georgia should bear great weight in a determination of whether the State of Georgia has assumed the status of a private individual with respect to its right to recover under the remedial provisions of the anti-trust laws.

3. When a State has divested itself of its sovereignty it must bear the burdens of individuals and is entitled to their remedies.

It is long since settled that where an Act of Congress imposes a burden upon a "person," a State may so assume the status of an individual person by its own action as to be liable to the imposition of that burden, even though the sovereign would not ordinarily be bound.

In

Commonwealth of Pennsylvania vs. Fix
9 Fed. Supp. 272,

it was held that a state engaged in the sale of alcoholic, spirituous, vinous, fermented and other liquors for beverage purposes, was a "person" within the

Federal Liquor Taxing Act imposing an excise tax upon every "person" therein described, and providing that "person" should also include a partnership, association, company, or corporation. The court said:

> "When a state engages in private business, it divests itself, so far as its transactions in that private business are concerned, of its sovereign character, and takes that of a private citizen. Instead of communicating to that private business its privileges and prerogatives, it descends to the level of a private citizen. As to the transactions in such private business, it cannot claim the privileges or immunities of a sovereign."

In

State of Ohio vs. Helvering
292 U. S. 360, 78 L. ed. 1307,

it was held that a State is embraced within the meaning of the term "person" as used in a statute imposing an excise tax on persons selling liquor and providing that "where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person' as used in this title shall be construed to mean and include a partnership, association, company or corporation, as well as a natural." See also

South Carolina vs. United States
199 U. S. 437, 50 L. ed. 261.
United States of America vs. State of California, 297 U. S. 175, 80 L. ed. 567.

In

Allen vs. Regents of the University System of Georgia, 304 U. S. 439, 82 L. ed. 1448,

the Court had under consideration a United States statute which imposed a tax upon the amount paid

for admission in certain instances and which required the person receiving payment for admissions to collect the tax and make returns, to keep records and render statements under oath, and fix penalties for failure to collect or pay over the same. In that case, the court assumed that the burden of collecting the tax was imposed immediately upon the State agency and that the tax was imposed directly on the State activity. It held that where the State had embarked in a business which would normally be taxable, the fact that in so doing it was exercising its governmental power, did not render the activity immune from Federal taxation and that the immunity of State agencies from Federal taxation enjoyed from the dual sovereignty recognized by the Constitution did not extend to business enterprises conducted by the State for gain. Thus, again the Supreme Court placed the State in the category of a private individual and within the meaning of the word "person" as that word was used in an Act of Congress even though the result was to impose a liability upon the State. See also,

Helvering vs. Powers
293 U. S. 214, 79 L. ed. 291.

In

Republic of Honduras vs. Soto
19 N. E. 845, 112 N. Y. 310.

the Court of Appeals of New York held that the Republic of Honduras was a "person" within the meaning of the Code of Civil Procedure of that state providing that a plaintiff who is "a person residing without the state" or "a foreign corporation" could be required to give security for costs. In that case the court said:

"The word 'person' was, we think, used in its enlarged sense as comprising all legal entities except foreign corporations, which were authorized to bring actions in this State. In that sense it embraces moral persons having legal rights, capable of entering into contracts, and incurring obligations, as well as natural persons. The statutes must be construed with reference to the objects it had in view, the evils intended to be remedied, and the benefits expected to be derived from it; and, as thus construed, we can see no reason why the plaintiff is not included within the description of persons intended to be subjected to the obligations of the statute."

Where the sovereign has divested itself of its sovereignty and has assumed the status of a private individual, thus becoming subject to laws imposing burdens or liabilities, there is no logical reason why it should not also be entitled to participate in the rights and remedies accorded private individuals. Every consideration of reason and justice would make it so. The State should not be discriminated against and denied that which is granted its humblest citizen. Upon a contrary holding, the decisions of the Supreme Court according the State the protection of the Constitution become but empty verbiage. Firmly established by the decisions of this court is the principle that when the sovereign suffers an injury analogous to that suffered by one of its subjects it has an analogous remedy, or a right to elect to avail itself of the same remedy afforded the subject. Texas vs. White, supra; Florida vs. Anderson, 91 U. S. 667; 23 L. ed. 290; Alabama vs. Burr, 115 U. S. 413; 29 L. ed. 435. For a concise summary of these cases see Wisconsin vs. Pelican Ins. Co. 127 U. S. 265; 32 L. ed. 239.

CONCLUSION

In the final analysis, the question presented for determination is whether Congress intended the State to be excluded from the meaning of the word "person" as used in Section 7 of the Sherman Act. While the cases cited and the rules which they announce are but sign-posts intended to aid the court in arriving at the proper solution to this question, they have met the test of generations of judicial examination, and all point to one inescapable conclusion: that the State is authorized to recover under Section 7 of the Act.

If the remedy provided by the act is coextensive with the broad conception of public policy upon which it was founded to prevent harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, then no more appropriate case can be discovered than the instant one for the application of that salutary principle announced so long ago by the Court in the Magdalen College case, supra, that "The law will never make an interpretation to advance a private and to destroy the public, but always to advance the public, and to prevent every private, which is odious in law in such cases. And therefore it is well said in Heydon's case, in the Third Part of my report, f. 7 b. The office of Judges is always to make such construction as to suppress the mischief, and advance the remedy; and to suppress subtle inventions and evasions for the continuance of the mischief, et pro privato commodo. and to add force and life to the cure and remedy according to the true intention of the makers of the act pro bono publico."

Reliable statistics show that the total cost payments for the operation of the State Governments during 1938 exceeded $4,000,000,000, and that of Georgia alone was $61,145,000.* Much of this amount was used to purchase enormous quantities of commodities, such as asphalt for the paving of roads which is involved in this suit, moving in interstate commerce. The State is trustee for the members of the public, from whom its revenue is derived, and an injury or damage to its property is an injury or damage to every taxpayer. Bearing these things in mind can it with reason be said that the Sherman Anti-Trust Act discloses any intent of Congress to deprive these trustees and their beneficiaries of any redress, or the same redress which would be readily afforded to the humblest subject of the State suffering injury to his property as the result of a monopoly? Did Congress intend their Act to be so construed as to violate the following well settled rules of construction: a remedial statute is to be liberally construed to effectuate its purpose; the sovereign may take the benefit of any remedial statute although not specifically named therein; a statute should not be interpreted so as to produce an unreasonable or unjust result? Obviously not.

It would be an injustice to Congress itself, to construe a public act of that body as intending to leave the State remediless against the very activities which were prohibited by the terms of the enactment; especially so when there is no express language requiring such a construction. To deny to the State

*Figures prepared by C. E. Rightor, Chief Statistician, Division of State and Local Government, U. S. Bureau of Census.

the remedy which is granted to its humblest citizen and thus to leave the State at the complete mercy of wrong-doers is, in truth, a construction which lends force and life to the mischief and suppresses the cure and remedy; one pro privato commodo and not pro bono publico.

Of such vast importance is the question now before the court that the Attorneys General of thirty-four States, namely: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, filed briefs amici curiae in support of the petition for certiorari when it was presented by appellants; and, together with the State of Georgia, most urgently insist that this court should not so construe Section 7 of the Anti-Trust Act as to exclude the appellant and other States from its remedial provisions. The judgment of the Circuit Court should be reversed.

Respectfully submitted,

ELLIS G. ARNALL
Attorney General

E. J. CLOWER
Assistant Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 872

STATE OF GEORGIA, *Petitioner,*

vs.

HIRAM W. EVANS, ET AL, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

MORGAN S. BELSER,
HAL LINDSAY,
Attorneys for Hiram W. Evans

HAL LINDSAY,
Attorney for John W. Greer, Jr.

FELIX T. SMITH,
B. B. TAYLOR,
BARRY WRIGHT,
Attorneys for The American Bitumuls Company

C. S. GENTRY,
E. W. MOISE,
ALLEN POST,
Attorneys for Shell Oil Company, Incorporated

MARION SMITH,
Attorney for Emulsified Asphalt Refining Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

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vs. No. 872

HIRAM W. EVANS, ET AL

ON PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENTS

INTRODUCTORY

The United States District Court for the Northern District of Georgia entered judgment dismissing the complaints of the State of Georgia herein, for failure to state a claim upon which relief can be granted.

The Circuit Court of Appeals for the Fifth Circuit affirmed. *123 Fed. (2d) 57.*

The State of Georgia filed its petition for writ of certiorari.

ISSUE

The sole issue presented is one of law, that is, whether the State of Georgia possesses under the Sherman Act the right of suit for treble damages.

ARGUMENT

The question raised by the petition in this case is one that was settled by this Court in *U. S. vs. Cooper Corporation, 312 U. S. 600.* It seems unnecessary to burden the docket of this Court with another such case. For the convenience of the Court the respondents are filing a joint brief.

In *U. S. vs. Cooper Corp., 312 U. S. 600,* this Court held that the right to treble damages conferred by the Anti-Trust Acts was given to natural and artificial persons, that is, individuals and corporations, and that the United States is not such a person or corporation.

It is equally apparent that the State of Georgia is not such a natural or artificial person.

That the Anti-Trust Acts create new rights and new remedies, and that those rights and remedies are conferred only upon the class embraced within the word "person" as used in the Acts, was not established first by *United States vs. Cooper Corporation.* This Court had settled that rule in *Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165; Fleitmann vs. Welsbach Street Lighting Co., 240 U. S. 27; Geddes vs. Anaconda Copper Mining Co., 254 U. S. 590.*

These Acts were designed to prevent monopolistic practices and to impose regulatory prohibitions upon "any person" guilty of monopolistic practices. The Acts regulate what may be done or not done by those persons subject to its provisions. They give to those persons rights to protect themselves against the prohibited monopolistic practices. The rights conferred, and the regulations imposed, fall upon the same class. The word "person" has only one meaning in the statutes. The word is defined in the Act, and that definition gives only one meaning to the word.

The brief for the petitioner carefully restricts the claim that the State of Georgia as a "person" under the Anti-Trust Acts to that of a recipient of rights, and excludes the State of Georgia as a "person" from any obligation under the Acts. The word "person" is given two meanings under the Acts. When the word is used to grant a right of suit, it is said that the State is a "person," but care is taken never to admit that the State is a "person" that is subject to the regulatory provision of the Acts or that may be sued for treble damages.

On page 16 of the brief of the petitioner, it is said:

> "If a State is a 'person' within the meaning of an Act of Congress regulating an activity in which a State engages, it is also a 'person' for the purpose of availing itself of the remedies provided by an Act of Congress for the injuries which it has sustained."

But the condition of this sentence that a State is a "person" within the regulatory provisions of the Anti-Trust Acts is carefully never conceded.

The position is maintained that the word "person" has two meanings in the Act. This is hardly credible, for there is nothing in the language of the Act that indicates the use of the word in but one sense. By the language of the Act the word "person" or "persons" is given one meaning *"wherever used"* (USCA Title 15 §12) in the sections of the Act here under consideration.

As this Court said in *U. S. vs. Cooper Corp., 312 U. S. 600*: "The ordinary dignities of speech would have led" to the mention of the name of the United States, if it had been intended to include the United States as a person. This is even more true as to a State. One sovereign does not legislate for another sovereign. Certainly, the statutes of one sovereign will not be construed to include and regulate the

acts of another sovereign, without express mention of that other sovereign. This seems particularly to be true of the Anti-Trust Acts. They give to any person injured by the acts of any other person a right to recover treble damages. The person causing the injury may be sued for treble damages only in the Federal Courts. Yet the Constitution specifically denies jurisdiction in the Federal Courts of any suit of any kind against a State. Congress could not have intended to include a State in the term "person" of the Anti-Trust Acts.

It is not sufficient to say that whether a State may be liable for treble damages will be decided when that question is presented. The sole question here is whether the State is a "person" and that word is used in only one sense in the Act. Any "person" can be sued for treble damages. A State cannot be sued by the very exclusion of the Act restricting actions for treble damages to the Federal Courts. Nor may the question be properly evaded by assuming that it will never arise and ignoring it. The private activities of States are increasing. The State of Florida was recently sued in the State Courts of Georgia. *Florida State Hospital for Insane vs. Durham Iron Co., 17 S. E. (2d) 842.* And in *Lowenstein vs. Evans, 69 Fed. 908,* long ago the Court considered whether the State of South Carolina was a "person" that under the Act was subject to regulation and treble damages for a monopolistic practice.

The brief for the petitioner takes the position that unless the State of Georgia is permitted to sue for treble damages under the Anti-Trust Acts, it will be left without remedy, and argues that the State of Georgia therefore must be held to be a "person" under those Acts. This position is not sound.

The State of Georgia is a sovereign, with power to legislate, and may legislate to protect itself against monop-

olistic practices, even though those practices involve interstate commerce. *Louisville & Nashville Railroad Co. vs. Commonwealth of Kentucky, 161 U. S. 677; Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86.*

The question presented to the Court is one that was settled by this Court when it decided in *U. S. vs. Cooper Corp., 312 U. S. 600,* that a "person" under the provisions of the Anti-Trust Acts included only natural and artificial persons, that is, individuals and corporations, and that the United States was not a "person" entitled to sue for treble damages under the Act. This case seemed to be so completely covered by *U. S. vs. Cooper Corporation* that the Circuit Court of Appeals of the Fifth Circuit affirmed the decision of the District Court dismissing the action with only a per curiam decision. The denial of the writ of certiorari in the present case will be taken to settle the question definitely. There is no conflict in decision.

Just a few days after the petition for certiorari was filed in this case counsel for the respondent were served with a printed brief amici curiae in behalf of 34 States other than Georgia, which, however, bears upon the cover the words "Williams Ptg. Co., Atlanta.".

The amici curiae speak of their "apprehension" lest the judgment of the Circuit Court of Appeals "will greatly limit and restrict the remedies available to a State." It is not suggested that any of these States have any suits now pending in which they seek to proceed under the Anti-Trust Acts, nor is it suggested that any of them contemplate filing any such suits.

These statutes have been in force for many years, and there is no record of any State ever attempting to bring a suit under this provision before the present case. The "apprehension," therefore, of the amici curiae is a little diffi-

cult to understand since, heretofore at least, all States have found their own laws ample to protect their interest. Also, the fact that this printed brief appeared so promptly, and was printed in Georgia, indicates a response to an organized effort to have permision to use the names of the States filing the brief rather than any real or spontaneous apprehension or interest existing in those States. The Attorneys General of the several States would naturally accommodate the Attorney General of a sister State where they could do so with propriety, and with no risk to the States for which they acted.

Respectfully submitted,

MORGAN S. BELSER,
HAL LINDSAY,

Attorneys for Hiram W. Evans

HAL LINDSAY,

Attorney for John W. Greer, Jr.

FELIX T. SMITH,
B. B. TAYLOR,
BARRY WRIGHT,

Attorneys for The American Bitumuls Company.

C. S. GENTRY,
E. W. MOISE,
ALLEN POST,

Attorneys for Shell Oil Company, Incorporated

MARION SMITH,

Attorney for Emulsified Asphalt Refining Company

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EMULSIFIED ASPHALT REFINING CO.,
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BRIEF FOR RESPONDENTS

MORGAN S. BELSER,
HAL LINDSAY,
Attorneys for Hiram W. Evans.

HAL LINDSAY,
Attorney for John W. Greer, Jr.

FELIX T. SMITH,
B. B. TAYLOR,
BARRY WRIGHT,
DONALD R. RICHBERG,
Attorneys for American Bitumuls Co.

E. W. MOISE,
R. L. WAGNER,
C. S. GENTRY,
Attorneys for Shell Oil Co., Inc.

MARION SMITH,
Attorney for Emulsified Asphalt Refining Company.

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BRIEF FOR RESPONDENTS

The counsel filing this brief represent the respective respondents indicated by their signatures, and each of course speaks for his own client only. It was believed, however, that it would be a convenience to this Court for the contentions made by the counsel for the respective respondents to be combined in one brief.

REFERENCE TO REPORT OF OPINIONS IN THE COURTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed in 123 Fed. 2nd, 57. (Advance sheet No. 1, December 8th, 1941.)

THE QUESTION HERE IS ONE OF STATUTORY CONSTRUCTION ONLY

Do the Federal Anti-Trust Acts grant to a state the right to recover treble damages? Is a state embraced within the term "person" to whom such cause of action is granted? We are not here dealing with the question of whether a state may be a person under some other statute, or how far the term "person" may under other circumstances and in other uses include a state. The question is narrower than this: It is whether the term as used in the Anti-Trust Acts includes a state.

Rules of statutory construction are no more than aids in arriving at a solution of such a question. The answer must be found primarily within the four corners of the statute itself, and from a consideration of every relevant feature in the statute.

This Court has in a number of late cases pointed out one landmark which every court should bear in mind in approaching the construction of a statute. This has been done by the repeated warning given recently by this Court against straining the use of considerations of policy

beyond their legitimate function in the construction of a statute. Considerations of policy can to some extent be an aid, but as this Court has warned, there is always danger that the misuse of such considerations will result in substituting the judge's own views on economic and social problems in place of the enactment itself. The briefs of petitioner and of the amici curiae dwell so largely on considerations of what they assert to be public benefit that a brief reference to the warning so given by this Court is here in order.

In *United States vs. American Trucking Associations, Inc., 310 U. S. 534, at 544,* the Court says:

> "Obviously there is danger that the court's conclusion as to legislative purpose will be unconsciously influenced by the judge's own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat. . . ."

In *McGlain vs. Commissioner of Internal Revenue, 311 U. S. 527, at 530,* the Court says:

> "The answer is that we must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation."

In *United States vs. Cooper Corporation, 312 U. S. 600, at 605* (a case to be referred to more fully later), the Court says:

"It is not our function to engraft on a statute additions which we think the legislature logically might or should have made."

And as late as March 2, 1942, in *Cudahy Packing Co. of La. Ltd. vs. Holland, 62 S. Ct. 651, 656,* this Court says:

"Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, *that it is any part of the judicial function to restore to the Act what Congress has taken out of it.* Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and *that this precludes our restoring it by construction.*" (Italics ours)

UNITED STATES VS. COOPER CORPORATION, 312 U. S. 600, IS SOUND AND NECESSARILY CONTROLS.

The statute giving the right to recover treble damages under which this suit is brought is *§ 7 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209,* as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be un-

lawful by this Act, may sue therefor, in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

In the *Cooper Corporation case* above referred to, the Court held that the term "person" as used in this statute to whom a cause of action for treble damages is given, was limited to "natural and artificial persons, that is, individuals and corporations." It was specifically held that it did not include the United States because it was a sovereign government. Both the District Court and the Circuit Court of Appeals treated it as perfectly obvious that such construction likewise excluded a state government. There are additional reasons for excluding a state government. We merely note here that the effort of the petitioner to distinguish the ruling in the *Cooper Corporation case* from the case at bar is wholly without merit.

The distinction attempted is set out in the opposing brief, commencing at page 37. Counsel assert three propositions which will be considered separately:

1. It is asserted that the State, by entering into the Federal Union under the Federal Constitution, surrendered its sovereignty so far as interstate commerce is concerned, and hence is not a sovereign "with reference to the United States Anti-Trust Acts because they apply only to interstate commerce."

The answer to this, of course, is quite simple. The State did surrender its sovereign power to regulate interstate commerce, but it surrendered nothing else in this respect.

2. Counsel then assert that because of a certain Georgia statute the State has voluntarily assumed the status of an individual. That Georgia statute is *§ 91-405 of the Georgia Code.* Petitioner's brief p. 46.

As we understand this proposition, counsel contend that a state merely by authorizing a suit to be brought surrenders all its sovereign rights. No case is cited for any such conclusion. This statute merely authorizes the Attorney General to institute suits to recover debts and property belonging to the State. It has never been held that a state by merely instituting actions in its name abandoned its sovereign capacity.

Counsel's point here appears to be wholly illogical. It seems to be a contention that this State statute has the effect of conferring on the State a right under the Federal statute which it would not otherwise have possessed. No state legislation could accomplish this. The State is either granted the right to sue by the Federal statute or it is not. No act on its part can enlarge the grant or supply its absence.

3. Counsels' third point is that by purchasing paving materials in interstate commerce the State of Georgia "divested itself of its sovereignty" and assumed "the status of an individual person by its own action." The con-

clusion that counsel draw from this is stated in their syllabus as follows: "When a state has divested itself of sovereignty it must bear the burdens imposed on individuals and is entitled to their remedies."

The first observation about this is that it would in no way distinguish this case from the Cooper Corporation case, because the United States in that case was purchasing materials, and the State is in law as much a sovereign as the United States, and since the mere purchase of materials did not divest the United States of its sovereignty, it could not have that effect with respect to a state.

The second observation is that the State was buying these materials to pave roads, and the construction of public roads is a high governmental function, not a commercial venture in any sense.

And the third is that counsels' position goes much too far. They do not state what burdens the State would assume as a result of thus (as they say) divesting itself of sovereignty, but it is well enough to mention some of the consequences that would follow if their position were ever accepted. Some of the consequences are these: The State could be sued under the Sherman Act in those instances where it has created a monopoly in interstate commerce; it could be sued without its consent in the Federal Courts; the Eleventh Amendment of the Federal Constitution would no longer apply; and the State would be liable for torts and could be sued therefor.

That all of this is not fanciful will be shown later in the brief when we point out that an attempt was once

made to sue the State of South Carolina under the Federal Anti-Trust Acts.

We are confident that this Court will not accept a doctrine having such far-reaching consequences. Arguments about "sovereignty" and "divesting sovereignty" are highly metaphysical. When they lead to such revolutionary results they answer themselves.

It is thus apparent that the Cooper Corporation case can in no way be distinguished from the case at bar. The same rule must inevitably apply to a state government. Indeed, there are additional reasons why the case for excluding a state government is even stronger.

THE STATUTES SHOW THAT A STATE HAS NOT THE RIGHT TO RECOVER TREBLE DAMAGES

The question is whether a state is a "person" to whom a right of action for treble damages is given by Section 7.

The Anti-Trust Acts created new rights and remedies which are available only to those upon whom they are conferred by the Acts.

United States vs. Cooper Corporation,
312 U. S. 600.

D. R. Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165, 174.

Fleitmann vs. Welsbach Street Lighting Co., 240 U. S. 27, 29.

Geddes vs. Anaconda Copper Mining Co., 254 U. S. 590, 593

The rights conferred by the Anti-Trust Acts have their sole origin in the statutes and are possessed only by those to whom the statutes grant the rights.

1. Normal Meaning of "Person."

The right to recover treble damages under Section 7 of the Sherman Act is granted to "any person who shall be injured in his business or property." In common usage the word "person" does not include a sovereign, and it was admitted by the Government in the Cooper Corporation case that this was true. If the purpose was to include the enacting sovereign "the ordinary dignities of speech would have led" to its mention by name.

Davis vs. Pringle, 268 U. S. 315, 318.

United States vs. Cooper Corporation, 312 U. S. 600.

This rule is even more true as to another sovereign, such as one of the States. Certainly the statutes of one sovereign would not be construed to include another sovereign without express mention of that other. An examination of the cases where a sovereign has been held to be included within the statute without being named will show that they go only to the point of including the sovereign which itself enacted the statute. It would be

extraordinary for one sovereign to enact a regulatory statute that would attempt to embrace another sovereign even though mentioned specifically. Certainly, another sovereign would never be included by implication.

2. USE OF THE WORD "PERSON" IN THE ANTI-TRUST ACTS

Section 7 of the Sherman Act provides that any "person" who shall be injured by "any other person or corporation by anything declared to be unlawful under the Act, shall have the right to recover treble damages." Plainly the word "person" is used in only one sense. There is nothing to indicate different meanings for the two uses of the word in the same sentence. The word "other" directly connects the word "person" the second time it is used with the same word as it first appears in the sentence, thus giving the word the same significance in both places in the sentence. In the first instance the word "person" indicates the one to whom the right is given. In the other instance it indicates the one of whom damages may be recovered. The word "other" links the second use of the word "person" back to the first use and indicates that it has the same significance.

The word "person" is used in other sections of the Anti-Trust Acts.

In Section 1 it is provided that "every person who shall make any contract or engage in any combination or conspiracy *** shall be deemed guilty of a misdemeanor ***" and be punished therefor.

In Section 2 it is provided that "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce*** shall be deemed guilty of a misdemeanor***" and be punished therefor.

In Section 3 of the Act it is provided that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor ***" and be punished therefor.

A "person" in the sense of the Acts is made subject to criminal prosecution. Criminal prosecution of a State by another sovereign could not have been intended yet the word "person" is used uniformly throughout the Act.

In Section 8 of the Act it is provided that wherever the word "person" is used that the word "shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any territories, the laws of any State, or the laws of any foreign country." The section was evidently inserted to make certain that there should be included every entity that was intended to be subject to the Act. Corporations and associations existing under the laws of the United States or of a state were included. If it had been intended to include the States themselves in the all inclusive provision of Section 8 it would have been expected that they would be specifically named. Corporations existing under the laws of the States are included but the States that created those corporations are not included.

The State as a corporation was expressly excluded when the corporations to be included as "persons" were restricted to corporations created by the United States or any of the States. If a state is a person, Section 8 is surplusage. Any such construction must be avoided.

The whole matter becomes clearer if we take the language of Section 8 of the Act and write it directly into Section 7 of the Act. This is entirely permissible because the purpose for which Section 8 was inserted is thus carried out. Combining the two sections in this way the following results:

> "Any person, *including corporations or associations, existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country,* who shall be injured in his business or property by any other person or corporation, *including corporations or associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country,* by reason of anything forbidden or declared unlawful by this act, may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, with respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Italics indicate provisions taken from Section 8.)

No one reading the statute so stated could have the slightest doubt that the word "person" wherever used in the statute meant a natural person or an ordinary private corporation.

It is significant that Section 8 is inserted at the end of the Act. It refers back to the whole of the Act and all of its provisions. Its language itself declares that its statement of the word "person" applies "wherever used in this Act." Only one meaning of the word "person" is permitted.

It is significant too that when the Clayton Act was passed in 1914 the language of Section 8 was copied into the Clayton Act. "Person" was said to mean the same thing in the Clayton Act that it means in the Sherman Act. Between the passage of the Sherman Act in 1890 and the passage of the Clayton Act in 1914 there had been a number of decisions by Federal Courts stating that the word "person" meant only a private party. We shall refer hereafter specifically to those decisions.

The word "person" is used in the Acts in only one sense, yet the Acts subject persons to criminal prosecution and to liability for treble damages. No prosecution or suit for treble damages against the United States or any State could have been intended. Such prosecution and suit would clearly have been authorized unless the word "person" is used in two radically different senses, which Congress expressly prohibited by saying that the word had the same meaning "wherever used in this Act."

3. The Plan of the Sherman Act.

The scheme and plan of the Act seems to have been clearly envisaged by the draftsman.

Sections 1, 2, and 3 provide for criminal prosecution for violations of the provisions of the Act. Section 4 gives a right of injunction to restrain violations of the Act at the suit of the United States alone, and Section 5 refers to the service in those suits. Section 6 authorizes the seizure by the Government of goods transported in violation of the Act.

All the provisions of Sections 1 through 6 deal with remedies afforded to the United States, then Section 7 takes up a different subject and creates the right of a person to recover treble damages for injuries to his business or property by any other person by reason of anything forbidden in the Act. This plan of the Act shows a clear definition of rights conferred upon the United States and rights conferred upon "persons." The United States was included in the first six paragraphs but in the seventh paragraph the right to recover was given only to "persons" referred to in Section 7. The right was given only to natural and artificial persons; that is, individuals and corporations, even though the language of the section is plainly an expansion of the everyday meaning of the word "person."

4. Legislative History of the Anti-Trust Acts.

The legislative history of the Sherman and Clayton Acts is useful in the construction of the meaning of the word "person."

When the Sherman Act was under discussion, it was pointed out that Section 1 authorized the United States to bring civil actions including those for simple damages; and that under Section 2, private parties could recover double damages. Senator Sherman stated that the right to recover double damages was only in private parties, and not in the United States. He stated that the civil suit by the United States authorized by Section 1 might be for an ouster of the power of the corporation for damages or in quo warranto, and said:

> "But the second section provides purely a personal remedy, a civil suit also by citizens of the United States."

Senator Hoar re-wrote most of the bill, and eliminated Section 1 with its provision for civil suits by the United States, and substituted Sections 1, 2, 3, 4 and 6, defining the remedies, civil and criminal, and by way of forfeiture, available to the United States. He retained, with slight change, Section 2 of the bill increasing the damages recoverable to treble damages. In this form, the bill was adopted.

When the Clayton Act was under consideration by Congress, Senator Reed, a member of the Judiciary Committee, offered an amendment to the bill, reading:

> "That the Attorney General of any State may, at the cost of the State, bring suit in the name of the United States to enforce any of the Anti-Trust laws."

When we keep in mind the fact that the language of the Clayton Act, particularly in its reference to the word "person" in Section 1, is identical with the language of the Sherman Act, it seems clear that Congress recognized that a State would not be included in the remedies unless specifically named.

The amendment offered by Senator Reed was rejected.

In 1939, Senator O'Mahoney introduced a bill (S-2719) drafted to permit the United States to bring a suit for treble damages under the provisions of the Anti-Trust Act. This bill has now remained pending for more than a year since the decision in the Cooper Corporation case.

Evidently Senator O'Mahoney introduced his Bill back in 1939 in recognition of the line of cases, some decided prior to the passage of the Clayton Act and some since the passage of the Clayton Act, holding that the right to suit for treble damages was only in private parties, and Congress, since the Cooper Corporation case, has recognized the correctness of that construction in permitting the Bill to remain pending for more than a year.

5. JUDICIAL EXPRESSION OF THE MEANING OF "PERSON."

There is a considerable body of judicial expression extending over a long period of years that only private persons and corporations may sue for treble damages.

In *Lowenstein vs. Evans, 69 Fed. 908*, the Court said:

"The section of the act of 1890, sued upon, gives a right of action for any injury by any other person or corporation. The state is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator. The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and had conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union. Nor can it be said that the state is a person in the sense of this act. Even were this the case, as the monopoly now complained of is that of the State, no relief can be had without making the state a party, and this destroys the jurisdiction of this court. No opinion whatever is expressed as to the right of the plaintiff for violation of his common-law rights. In this proceeding and under the act of 1890, he must seek his remedy against the holder of the monopoly; and, as in the present case the monopoly is in the State, the court has no jurisdiction. The demurrer is sustained, and the complaint is dismissed."

The Court said in *Pidcock vs. Harrington, 64 Fed. 821 (C.C.,S.D.N.Y.)*:

"***a private person is given (section 7) the right to maintain an action at law;***The first three sections are penal statutes. They give no civil rem-

edy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribed the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy.*** The only section which gives a private remedy is the seventh***" (p. 822).

In *Greer, Mills & Co. vs. Stoller, 77 Fed. 1 (C.C.W. D.,Mo.)* the Court said:

"Section 7 gives to the private person 'injured in his business or property by any other person or corporation by reason of anything forbidden, or declared to be unlawful by this act,' a right to sue in a circuit court of the United States in the district in which the defendant resides or is found for threefold damages by him sustained. The statute, being highly penal in its character, must be strictly construed; and, having created a new offense, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, these remedies are exclusive of all others." (p. 3)

United States vs. Patterson, 201 Fed. 697 (S. D., Ohio), rev'd on other grounds *222 Fed. 599 (C.C.A. 6th)*, *cert. den. 238 U. S. 635*:

"The act does not primarily grant any right to be enforced in a civil action. It creates an offense, a

crime, describing what the crime is. To do the acts prescribed in the first and second sections is declared to be unlawful; that is to say, criminal. Hence the right given by Section 7 to an individual to recover for injury to his business or property with threefold damages, and the right given by section 4 to the government to prevent by injunction a continuance of the acts complained of, are rights growing out of the commission of a crime, by whomsoever it may be, whose acts also subject him to the criminal penalties of the statute. If he has been guilty of a crime described in sections 1 and 2, then he may be restrained by the government in a civil action, or be compelled by an individual who has been injured in his business or property to respond in threefold damages" (p. 714).

No change in the views of the lower courts has occurred.

Quemos Theatre Co., Inc. vs. Warner Bros. Pictures, Inc., 35 F. Supp. 949 (D.C.N.J.):

"***Section 7, the threefold damage clause of the Sherman Act was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement" (p. 950).

Glenn Coal Co. vs. Dickinson Fuel Co., 72 Fed. (2d) 885 (C.C.A. 4th):

"***It is well known that the main purpose of the Anti-Trust Act was to protect the public from

monopolies and restraint of trade and the individual right of action was but incidental and subordinate" (p. 889).

This Court has reaffirmed this position of the lower courts.

Standard Sanitary Manufacturing Co. vs. United States, 226 U. S. 20:

"The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively.*** Besides a suit by the Government there may be an action for damages by a 'person injured by reason of anything forbidden by the Act' " (p. 52).

General Investment Co. vs. Lake Shore & Michigan So. Ry. Co., 260 U.S. 261:

"As respects the Sherman Anti-Trust Act as it stood before it was supplemented by the Clayton Act, this Court has heretofore determined that the civil remedies specially provided in the act for actual and threatened violations of its provisions were intended to be exclusive and that those remedies consisted only of

(a) suits for injunctions brought by the United States in the public interest under Section 4 and

(b) private actions to recover damages brought under Section 7" (p. 286).

6. Administrative Interpretation of the Word "Person."

The administrative practice since the passage of the Sherman Act indicates that it has been the view of the United States and of the forty-eight States that there was no right of action in the United States or in any of the forty-eight States for treble damages for in the period of more than fifty years no such actions appear to have been filed except the Cooper Corporation case and the present case.

Administrative practice is entitled to substantial weight in the construction of statutes, particularly where it has lasted over the long period of fifty years. There is a long line of decisions by this Court so holding:

Trade Commission vs. Bunte Bros., (7th C.C.A., 1941) 312 U. S. 349, 352:

> "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315."

In *Norwegian Nitrogen Co. vs. United States (1933), 288 U. S. 294, at 315,* the Court says:

"True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. United States v. Moore, 95 U. S. 760, 763; Logan v. Davis, 233 U. S. 613, 627; Brewster v. Gage, 280 U. S. 327, 336; Fawcus Machine Co. v. United States, 282 U. S. 375; Interstate Commerce Co. v. N. Y. N. H. & H. R. Co., 287 U. S. 178."

In *United States vs. Moore, (1887), 95 U. S. 760, at 763*, the Court says:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. Edwards v. Darby, 12 Wheat. 210; United States v. The State Bank of North Carolina, 6 Pet. 29; United States v. MacDaniel, 7 *id.* 1. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In *Logan vs. Davis (1914), 233 U. S. 613, at 627*, the Court says:

"The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed

except for very cogent reasons. United States v. Moore, 95 U. S. 760, 763; Hastings and Dakota Railroad Co. v. Whitney, 132 U. S. 357, 366; United States v. Alabama Great Southern Railroad Co., 142 U. S. 615, 621; Kindred v. Union Pacific Railroad Co., 225 U. S. 582, 596."

In *Brewster vs. Gage (1930) 280 U. S. 327, at 336*, this Court says:

"It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. Logan v. Davis, 233 U. S. 613, 627. Maryland Casualty Co. v. United States, 251 U. S. 342, 349. Swendig v. Washington Water Power Co., 265 U. S. 322, 331."

In *Wisconsin vs. Illinois (1929), 278 U. S. 367, at 413*, this Court says:

"This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. United States v. Minnesota, 270 U. S. 181, 205; Swendig v. Washington Water Power Co., 265 U. S. 322, 331; Kern River Co. v. United States, 257 U. S. 147, 154; United States v. Burlington & Missouri River R. R., 98 U. S. 334, 341; United States v. Hammers, 221 U. S. 220, 228; Logan v. Davis, 233 U. S. 613, 627."

In *United States vs. Minnesota* (*1926*) *270 U. S. 181, at 205*, the Court says:

> "The Act of 1860 was construed as we here construe it by Secretary Delano in 1874, 1 Copp's P.L.L. 475m and by Secretary Schurz in 1877, 2 *id.* 1081; and their construction was adopted and applied by their successors up to the time of this suit, and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction."

7. ADDITIONAL REASONS WHY A STATE IS NOT A "PERSON."

All of these reasons were given by this Court in the Cooper Corporation case as reasons for holding that the United States was not a person who could recover treble damages. Every reason for holding that the United States is not a person under the Anti-Trust Acts is an equally strong reason for holding that one of the States is not such a person with the right to recover treble damages, and there are additional reasons why a state cannot be a person with the right to recover treble damages.

By the express provisions of Section 7 of the Act, a "person" may sue for treble damages only in the District Court. This is an express condition upon the right

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*3 L.D. 474, 476; 22 *id.* 388; 27 *id.* 418; 32 *id.* 65, 328; 37 *id.* 397.

created by the Act. No other court has jurisdiction. We must assume that Congress was familiar with the fact that under Article Three, Section 2, Paragraph 2 of the Constitution of the United States the Supreme Court of the United States is given original jurisdiction of suits brought by a state. Hence, had Congress intended to create a right for a state to recover treble damages under Section 7 of the Sherman Act, it seems very unlikely that Congress would at the same time have so conditioned the right as to deprive a state of its right under the Federal Constitution to bring an original suit in the Supreme Court of the United States.

The Eleventh Amendment of the Constitution of the United States prohibits a suit in the District Court against any state. If a state is a "person" under the terms of the Act it may be made a defendant as well as be a plaintiff. Yet jurisdiction of suits under the Anti-Trust Acts is confined to a court in which the Eleventh Amendment expressly prohibits the bringing of a suit against a state.

8. Reply to the Petitioner's Objections to This Reasoning.

To this reasoning the State of Georgia makes certain replies which we believe we can show are unsound.

a. The Anti-Trust Acts are not merely remedial as the State assumes but are acts that create new rights.

The State claims that the statute is remedial and as a remedial statute should be liberally construed. It is said

that Section 7 is not penal but is a remedial provision. This contrast between a penal provision and remedial provision ignores the real point that the Anti-Trust Acts create new rights. These Acts are not merely remedial, affording a remedy for a pre-existing right. The source of the right is the new Act itself. Though the Anti-Trust Acts are not penal in the technical sense of the word it has been held that the provisions for treble damages is punitive and must be construed just as written.

Fleitmann vs. Welsbach Street Lighting Co., 240 U. S. 27, 29.

American Banana Co. vs. United Fruit Co., 153 Fed. 943, 944.

Decorative Stone Co. vs. Building Trades Council of Westchester County, 23 Fed. (2d) 426. Certiorari denied, 277 U. S. 594.

Greer Mills & Co. vs. Stoller, 77 Fed. 1, 3.

Johnson vs. Jos. Schlitz Brewing Co., 73 Fed. (2d) 176, 182.

D. R. Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165, 173-175.

Hansen Packing Co. vs. Armour & Co., 16 F. Supp. 784, 787.

La Chappelle vs. United Shoe Machinery Co., 13 Fed. Supp. 939.

The State then takes the position that the reasoning in the Cooper Corporation case was falacious, and cites

certain cases that it is claimed hold remedial statutes include the sovereign, although not named. The statutes involved in these cases were entirely different from the Anti-Trust Acts. They were not statutes creating rights and then affording remedies to enforce those rights but were statutes which offered general remedies for rights that existed independently of the statute.

We shall refer to cases cited by the petitioner.

United States vs. Fox, 94 U. S. 315, involved a statute which governed the descent of land in the State of New York and the question was whether the United States was a person that under that statute could acquire title to land by devise. This is the only case of those discussed by petitioner which did involve a statute which created rights and it was held that the statute did not create any right to the United States as a person to receive title to land by devise.

In *Stanley vs. Schwalby, 147 U. S. 508,* Stanley and others as servants of the United States in possession of land for the United States were made defendants in an action of trespass to try title. They pleaded the statute of limitations and the Court held that "if they showed the requisite possession in themselves as individuals, though in fact for the United States, under whose authority they were acting, the defense was made out. Agents when treated as principals may rely upon the protection of the statute." As the defendants were in possession of the land it is plain that they had rights based on that possession and were merely taking advantage of a

statute which afforded the negative relief of a limitation upon actions.

In *Pierce vs. United States, 255 U. S. 398*, the United States had title to a judgment for a penalty in the sum of $14,000.00. This pre-existing right the United States sought to enforce by the remedy of a creditors bill, and it was held a proper procedure.

In the *Queen and Buckberd's case, 1 Leon. 149; 74 Eng. Reprints 138*, the Queen sought damages for the value of a church to which she had the right to present. Her right to the property existed independently of the statute. It was held that she had the right to avail herself of the remedy of the statute.

In *Lord Berkley's case, 1561 Plow. 223, 243; 75 Eng. Reprints 339, 372*, the actual holding was that the King, although he is not mentioned by name in the Statute de Donis Conditionalibus, is bound by that Statute. The quotation made by counsel for the petitioner expresses the views of Weston, J., which did not prevail.

In *The Case of a Fine, 7 Coke 32 a; 77 Eng. Reprints 459*, the King had title to an estate tail. It was held that he could avail himself of the remedy to bar the estate tail.

In the *Queen vs. Cruise case, 2 Ir. Ch. Rep. 65*, the quotation of counsel for petitioner is obiter. In that case there was a petition for a Receiver founded on a judgment. The sole question was as to whether the statute in question barred, for a year after the judgment was en-

tered, the petition for a Receiver. The decision only went to the point that the bar of one year did not apply because under the provisions of the statute it was sufficient if a year had elapsed since the enrollment of the recognizance on which the judgment had been issued. The statute was purely remedial. It was said in the opinion that where the Queen took advantage of a remedial statute she was bound by the conditions imposed by the statute.

In *Tindal vs. Wesley, 167 U. S. 204*, it is said that the United States may "avail itself of all the remedies which the law allows to other persons, natural or artificial, for the vindication and assertion of its rights." The rights that were being considered by the Court arose out of the fraud of the defendant and not in any statute.

In *United States vs. Jacinto Tin Co., 125 U. S. 273*, the United States had been deprived of land by fraud. Its rights arose because of the fraud, wholly independently of any statute. The decision was that it could recover the land.

In *Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165*, cited by the State, this Court laid down the very rule for which we are here contending, that Anti-Trust Acts are the source of rights and that those Acts must be looked to to see to whom the rights are granted.

The cases which we have referred to above, upon which the petitioner relies, are not in point here. Those cases never approach the question here presented of the construction of a statute which is the source of newly created rights for which the statute also gives remedies.

The only one of those cases which deals with rights is *United States vs. Fox*, and there it was held that the United States was not a person who was a grantee of the rights.

b. The authorities cited by the State do not support the State's proposition that *United States vs. Fox* is against the weight of authority.

In *State Highway & Public Works Commissioner vs. Cobb, 2 S. E. (2d) 565, 215 N. C. 556*, while recognizing the availability of common remedies to a state the judgment of the Court went only to the point that the State of North Carolina had no rights under any statute or at common law to recover money that had been voluntarily expended in recapturing an escaped prisoner. There being no right existing or created by statute the Court denied recovery, notwithstanding available remedies.

In State vs. Dunniway, 128 Pac. 853, 63 Ore. 555, the State sought to recover possession of certain premises in the State House in which it obviously had the right of property. It was held that among other remedies available to the State to protect its essential and pre-existing rights an ordinary action of ejectment would lie therefor.

Vestal vs. Pickering, 267 Pac. 821, 125 Ore. 553, is a case where it was held that the State of Oregon could take as a beneficiary under a will. The right to pass the title to property by will is a statutory right. It comes from the State itself. In the absence of such grant of statutory right to the owner of property the title to property within the State would pass to the State upon death of the

owner. It was not necessary for the State to find its right to take the property in the Act. This case is in contrast to *United States vs. Fox*. Whereas control of title to property in a State is wholly within that State and can be regulated only by it such is not true of the United States. In the Fox case since there was no pre-existing right in the United States to control the passing of title on death of the owner it was necessary to find the grant of the right to take in the Act.

In re *Edges Estate, 14 Atl. (2d) 293, 339 Pa. 67*, and *Lenjert vs. Feldman, 202 Pac. 624, 110 Kan. 115*, are likewise distinguished.

Kansas vs. Herold, 9 Kan. 194, is a case where the United States was vested with title to property and Herold was simply prosecuted for trespass thereon.

In *State of Indiana vs. Woram, 6 Hill 33, 40 Am. Dec. 378*, the statute under consideration provided that the word "person" would extend to every corporation capable by law of making contracts. Obviously, a state can make a contract.

In *State vs. Odd Fellows Hall Assn., 243 N. W. 616, 123 Neb. 440*, the statute under consideration defines the word "person" to include any "other entity that may be the owner of property." Clearly this includes a state.

State vs. General American Life Ins. Co., 272 N. W. 555, 132 Neb. 520, involved a declaratory judgment statute. A declaratory judgment statute does not create rights but simply establishes a remedial procedure for adjudica-

tion prior to a breach of the contract or other default. It does nothing except accelerate a remedy and permits the parties to get an adjudication as to the rights already owned by them before default or breach. The statute here involved expressly declared that "This Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.***"

The other cases cited on page 30 seem to be irrelevant and require no comment.

c. The Acts Do Not Deprive the States of Any Remedy.

The State of Georgia is not without a remedy, as contended by the petitioner. It, at all times, has had the right to sue for damages suffered because of any wrongful conspiracy. *Brown & Allen vs. Jacobs Pharmacy Co., 115 Ga. 429.*

Further, the State Constitution provides in Par. IV, Section II, Article IV, that all contracts and agreements "which may have the effect, or be intended to have the effect to defeat or lessen competition, or to encourage monopoly" shall be illegal and void. If it was the intended public policy of the State of Georgia that the State should have a civil action for treble damages for violation of this provision of the Constitution, which is similar in its scope to the Anti-Trust Acts, such a provision could easily have been incorporated into the Constitutional provision or added by an enabling statute of the Legislature.

There is nothing in the Federal Constitution which prohibits any such legislation by the State even though interstate commerce may be involved. *L. & N. Ry Co. vs. Commonwealth of Ky., 161 U. S. 677; Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86.*

In neither the Constitution of the United States nor the Anti-Trust Acts is there any divesting whatsoever of any rights of the State of Georgia. The Anti-Trust Acts created new rights, granted them to the persons described in the statutes and intentionally omitted States as grantees of such right.

CONCLUSION

The single question of law here involved is a narrow one. Did Congress intend to extend the term "person" to include a state, in creating rights and punitive remedies in the Sherman and Clayton Acts? The objective is the intent of Congress, and not what Congress could, or should, have done.

The Cooper Corporation case has recognized that Congress intentionally omitted the creation of a right to recover treble damages in the United States, and there are many compelling reasons for the conclusion that Congress intentionally omitted the creation of such rights in states.

The term "person" wherever used in the Acts has but a single meaning under its express provisions. If, as contended, the term includes a state, the State by the

plain language of the Acts, would be subjected to stringent regulation by the United States, to criminal prosecution and fine, to a suit for injunction or civil action for treble damages in the District Court of the United States, contrary to the provisions of the Constitution of the United States, and the State would be deprived of its rights to sue in the Supreme Court of the United States. In return for all of this the State would receive only the right to recover threefold damages, instead of the right it now has at common law, to recover simple compensatory damages. Certainly Congress should have employed "the ordinary dignities of speech" by specifically naming the States to accomplish such far-reaching results.

The State is on a par with the United States as a sovereign, and requires equal dignity of expression in acts conferring rights and remedies upon it. The State, as a sovereign, has the power to create adequate rights and remedies for its own protection and, at common law, the State has a right to sue for and recover simple damages. It does not need, and should not have, punitive treble damages.

A state by its own acts cannot enlarge an act of Congress. The waiver of a state's sovereignty rests with its Legislature. A contention in a suit by a state, made by its Attorney General and executive officers that the State has waived its sovereignty, should not be accepted without close scrutiny of the authority so to do.

Every applicable rule of statutory construction points to the conclusion that a state has no right to recover treble damages under the Federal Anti-Trust Acts. No

state has asserted such a right for over fifty years until the institution of this case. The Courts have, in numerous decisions, recognized the right to recover treble damages as belonging only to private individuals. The language of the Acts does not permit the extension of the term "person" to include a state. The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MORGAN S. BELSER,
HAL LINDSAY,
Attorneys for Hiram W. Evans.

HAL LINDSAY,
Attorney for John W. Greer, Jr.

FELIX T. SMITH,
B. B. TAYLOR,
BARRY WRIGHT,
DONALD R. RICHBERG,
Attorneys for American Bitumuls Co.

E. W. MOISE,
R. L. WAGNER,
C. S. GENTRY,
Attorneys for Shell Oil Co., Inc.

MARION SMITH,
Attorney for Emulsified Asphalt Refining Company.

SUPREME COURT OF THE UNITED STATES

No. 872

October Term, 1941

STATE OF GEORGIA, Petitioner

vs.

HIRAM W. EVANS
JOHN W. GREER, JR.
THE AMERICAN BITUMULS COMPANY
SHELL OIL COMPANY, INCORPORATED
EMULSIFIED ASPHALT REFINING COMPANY,

Respondents.

Brief of the States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, as Amici Curiae.

WILLIAMS PTG. CO. ATLANTA

SUBJECT INDEX

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

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AMICI CURIAE BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

INTRODUCTION

The States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, sovereign States

of the United States of America, join in filing this brief as amici curiae in support of the petition for certiorari, for the following reasons:

1. The named States have an interest in the rule of law to be enunciated by this Honorable Court in this case if the petition for the writ of certiorari is granted, and,

2. The named States believe the rule of law declared by the United States Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the United States District Court for the Northern District of Georgia in this case to be erroneous because it improperly deprives a State of the right to maintain action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act. (See Appendix.)

I. INTEREST OF THE AMICI CURIAE.

The States which have joined in filing this brief as amici curiae have no interest in the outcome of this cause insofar as the facts or merits of the particular case are concerned. Their sole interest is in the rule of law adopted by the Circuit Court of Appeals, and the apprehension of these Amici Curiae arises solely from their belief that if certiorari is not granted, and the judgment of the Circuit Court of Appeals is not reversed, an erroneous principle of law enunciated by the court below will be allowed to stand; one which will greatly limit and restrict the remedies available to a State which has been injured or damaged in its property by a violation of the United States anti-trust laws.

II. STATEMENT OF THE CASE.

The State of Georgia filed a civil action on March 25, 1941, alleging, in substance, that the respondents had violated Sections 1 and 2 of the Act of July 2, 1890, Ch. 647,

26 Stat. 209, 15 U. S. C. 1 and 2, and that by reason of such violation the State was injured and damaged in its property in the actual amount of $128,027.13. The prayer was for treble damages. (R. 1-26).

The respondents filed separate motions to dismiss the complaint, asserting that the State was not a "person" upon whom a right of action for treble damages was conferred by Section 7 of the Act of July 2, 1890, or by Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 730, 731. (R. 27-34).

These motions were sustained and the District Court entered separate judgments dismissing the complaint as to each of the Respondents. (R. 34). An appeal having been prosecuted, the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 42).

The decision of the Circuit Court of Appeals is reported at State of Georgia vs. Evans et al., 123 Fed. (2) 57.

III. THE ISSUES INVOLVED.

The question presented is whether a State may maintain an action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act.

The argument of the Amici Curiae in this brief will be limited to the contention that the writ of certiorari should be granted because the case involves an important question of Federal law which has not been but should be decided by this Court. However, the assignments of error in the petition for certiorari (P. 5) are here adopted as a part of this brief since the Amici Curiae, or some of them, may desire to discuss the issues thereby raised more fully if the writ is granted.

IV. REASONS WHY THE WRIT SHOULD BE GRANTED.

The case involves an important question of Federal law which has not been but should be decided by this Court.

(A) The question has not been decided by this Court.

The District Court, in sustaining the motions of Respondents and dismissing the complaint, and the Circuit Court of Appeals, in affirming the judgment of the District Court, relied solely on the decision of this Court in United States vs. Cooper Corporation, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667. (R. 34, 41). The question presented in that case was whether the United States could maintain an action for treble damages under Section 7 of the Sherman Act. The question now presented was not before the Court in the Cooper case.

The decision in the Cooper case is not authority for the conclusion reached by the District Court and the Circuit Court of Appeals in this case. The aids to construction there relied on are not persuasive where a state brings the action. This is especially true with reference to the conclusions that the ordinary dignities of speech would have led Congress to mention the name of the United States; that the scheme and structure of the legislation afforded the United States criminal and civil remedies for the enforcement of the Acts; that other legislation having a similar scheme or purpose could be looked to by the Court in construing Section 7 of the Sherman Act; that the legislative history of the Sherman Act showed that a provision for civil suits by the United States was eliminated when the original draft of the bill was rewritten, and provisions were substituted specifying the remedies available to the United States; and that the administrative construction of the

United States officers had been that Section 7 did not include the United States.

Any general language used in the decision in the Cooper case, or in the authorities there cited, which might be deemed applicable to the question now presented may be persuasive but is not controlling. The argument used in stating the opinion of the Court in that case must be referred to the subject before it and construed in connection with the question to be decided there. *Moorewood v. Enequist*, 23 How. 491, 495, 16 L. Ed. 516, 517.

Where the specific question does not appear to have been raised the Court does not consider itself bound by the view expressed in the earlier case. *Cross vs. Burke*, 146 U. S. 82, 86, 36 L. Ed. 896, 898.

Thus the question presented in the instant case is not controlled by the decision in the Cooper case. It has never been decided by this Court.

(B) The Case presents an important question of Federal law.

The question presented is an important question of Federal law. Its solution depends upon the proper construction of Section 7 of the Sherman Act and Section 4 of the Clayton Act. It is important because it is a question of concern to all of the Amici Curiae, and if it is decided as the Amici Curiae believe it should be decided, will help to effectuate the public policy evidenced by the United States anti-trust laws. The States are large purchasers of commodities moving in interstate commerce. The restraint of trade in interstate commerce by the control of prices and the elimination and suppression of competition in respect to such commodities results in injury and damage to the property of the States, by forcing the payment of higher

prices than those at which such commodities could have been obtained in an open, competitive market.

The rule of law adopted by the District and Circuit Courts, which prohibits the States from maintaining an action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act leaves the States without a remedy provided by those Acts, and therefore is believed to be inconsistent with the broad conception of public policy upon which the United States anti-trust laws were founded, to make the remedies co-extensive with the injury sought to be prohibited.

The Amici Curiae respectfully request that the writ of certroiari to the United States Circuit Court of Appeals for the Fifth Circuit be granted.

THOS. S. LAWSON,
Atty. Gen. of Alabama,
Montgomery, Alabama.

JOSEPH CONWAY,
Atty. Gen. of Arizona,
Phoenix, Arizona.

JACK HOLT,
Atty. Gen. of Arkansas,
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Atty. Gen. of Connecticut,
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JAMES R. MORFORD,
Atty. Gen. of Delaware,
Wilmington, Delaware.

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Atty. Gen. of Florida,
Tallahassee, Florida.

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Boise, Idaho.

GEORGE N. BEAMER,
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Indianapolis, Indiana.

JOHN M. RANKIN,
Atty. Gen. of Iowa,
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Jefferson City, Missouri.

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Helena, Montana.

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APPENDIX

1890, July 2, Ch. 647, Sec. 7,
26 Stat. 209, 210.

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

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"That any person who shall be injured in his business or property by reason of anything forbidden in the Antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

SUPREME COURT OF THE UNITED STATES

No. 872

October Term, 1941

STATE OF GEORGIA, Appellant

vs.

HIRAM W. EVANS,
THE AMERICAN BITUMULS COMPANY
SHELL OIL COMPANY, INCORPORATED
EMULSIFIED ASPHALT REFINING COMPANY,
Appellees

Brief of the States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, as Amici Curiae.

WILLIAMS PTG. CO. ATLANTA

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AMICI CURIAE BRIEF

INTRODUCTION

The States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, sovereign States

of the United States of America, join in filing this brief as amici curiae in support of the contention of the State of Georgia that a State is not excluded from the remedy allowed "persons" under Section 7 of the Sherman Act and Section 4 of the Clayton Act. (See appendix).

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed as State of Georgia vs. Evans, et al, in 123 Fed. 2nd, 57. (Advance sheet No. 1, December 8th, 1941).

STATEMENT OF JURISDICTION

The authors of this brief adopt the statement of jurisdiction as made in the brief for appellant.

INTEREST OF THE AMICI CURIAE

The named states believe the rule of law declared by the United States Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the United States District Court for the Northern District of Georgia in this case (see State of Georgia vs. Evans et al, 123 Fed. (2d) 57) to be erroneous because it improperly deprives a state of the right to maintain action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act (see appendix).

The states which have joined in filing this brief as amici curiae have no interest in the outcome of this cause insofar as the facts or merits of the particular case are concerned. In carrying on their governmental functions, however, they, like their sister state of Georgia, are compelled to purchase vast quantities of commodities in the open market. Accordingly they are vitally interested in seeing that their

rights to avail themselves of remedies for injuries or damages sustained while making such purchases (due to illegal, monopolistic practices against which the Federal Anti-Trust Laws are aimed) are not precluded by a construction of the acts in question which would divest them of such rights and remedies. Their sole interest is in the rule of law adopted by the Circuit Court of Appeals, and the apprehension of these amici curiae arises alone from their belief that if the doctrine announced in the Cooper case is applied (as was done by the Circuit Court) to a state, and the judgment of said court is not reversed, an erroneous principle of law will be allowed to stand, one which will greatly limit and restrict the remedies available to a State which has been injured or damaged in its property by a violation of the United States anti-trust laws.

STATEMENT OF THE CASE

The State of Georgia filed a civil action on March 25, 1941, alleging, in substance, that the respondents had violated Sections 1 and 2 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. 1 and 2, and that by reason thereof the State was injured and damaged in its property in the actual amount of $128,027.13. The prayer was for treble damages. (R. 1-26).

The respondents filed separate motions to dismiss the complaint, asserting that the State was not a "person" upon whom a right of action for treble damages was conferred by Section 7 of the Act of July 2, 1890, or by Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 730, 731. (R. 27-34).

These motions were sustained and the District Court entered separate judgments dismissing the complaint as to

each of the Respondents. (R. 34). An appeal having been prosecuted, the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 42).

THE ISSUES INVOLVED

The question presented is whether a state may maintain an action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act.

The pertinent provisions of these statutes are printed in the appendix herein.

ARGUMENT AND CITATION OF AUTHORITY

It was not the intention of Congress by the use of the word "person" in Section 7 of the Sherman Act and Section 4 of the Clayton Act to exclude a State from the remedies provided by those Sections. When a State as proprietor has suffered injury analogous to that suffered by a private individual it may avail itself of the remedies provided "persons" for the relief of such injury.

Ohio vs. Helvering, 292 U. S. 360, 369, 78 L. Ed. 1307, 1310;

Pennsylvania vs. Wheeling and Belmont, 13 How. 518, 559, 14 L. Ed. 249, 266;

Texas vs. White, 7 Wall 700, 19 L. Ed. 227;

Florida vs. Anderson, 1 Otto 667, 675, 27 L. Ed. 290, 297;

U. S. vs. San Jacinto Tin Co., 125 U. S. 273, 31 L. Ed. 747;

U. S. vs. American Bell Tel. Co., 128 U. S. 315, 32 L. Ed. 450.

If the rule were otherwise then the sovereign would be placed in a position worse than that of any of its subjects.

Pierce vs. U. S., 255 U. S. 398, 65 L. Ed. 697, 702.

A State is within the definition of "person" as used in the statute providing a remedy for the relief of an injury when the State has sustained the injury sought to be relieved by the statute. But even if a State is not strictly within the definition of a "person" as used in Section 7 of the Sherman Act and Section 4 of the Clayton Act, its right to avail itself of the benefit of those Sections is inherent by reason of its sovereignty, unless there is shown an intent, expressed or implied, on the part of Congress to exclude it from the remedies there provided. There is no such expressed or implied exclusion in those Acts.

The decision of this court in,

U. S. vs. Cooper Corporation, 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 667,

is in conflict with a prior doctrine, intrinsically sounder and should be reviewed and overruled, insofar as said doctrine is sought to be applied to the right of a State to avail itself of the remedial provisions of the aforesaid statutes.

The rule of law adopted by the District and Circuit Courts, which prohibits the States from maintaining an action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act leaves the States without a remedy provided by those Acts, and therefore is believed to be inconsistent with the broad conception of public policy upon which the United States anti-trust laws were founded, to make the remedies co-extensive with the injury sought to be prohibited.

In addition to what is said herein the States filing this brief amici curiae adopt the argument and citations con-

tained in the brief filed by the appellant, and add their request that the judgment of the Circuit Court be reversed.

Respectfully submitted,

THOS. S. LAWSON,
Atty. Gen. of Alabama,
Montgomery, Alabama.

JOSEPH CONWAY,
Atty. Gen. of Arizona,
Phoenix, Arizona.

JACK HOLT,
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Carson City, Nevada.

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APPENDIX

1890, July 2, Ch. 647, Sec. 7,
26 Stat. 209, 210.

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

1890, July 2, Ch. 647, Sec. 8,
26 Stat. 209, 210.

"That the word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

1914, October 15, Ch. 323, Sec. 4,
38 Stat. 730, 731.

"That any person who shall be injured in his business or property by reason of anything forbidden in the Antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

SUPREME COURT OF THE UNITED STATES.

No. 872.—October Term, 1941.

State of Georgia, Petitioner, *vs.* Hiram W. Evans; John W. Greer, Jr., American Bitumuls Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 27, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Complaining that the respondents had combined to fix prices and suppress competition in the sale of asphalt in violation of the Sherman Law, the State of Georgia, which each year purchases large quantities of asphalt for use in the construction of public roads, brought this suit to recover treble damages under §7 of that Act, 26 Stat. 209, 210; 15 U. S. C. § 15. According to that section, "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States . . . , and shall recover threefold the damages by him sustained . . . .' Section 8 provides that "the word 'person,' or 'persons,' whenever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 26 Stat. 209, 210; 15 U. S. C. § 7.

The District Court dismissed the suit on the ground that the State of Georgia is not a "person" under § 7 of the Act. Deeming the question controlled by *United States* v. *Cooper Corp.*, 312 U. S. 600, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment. 123 F. 2d 57. The importance of the question in the enforcement of the Sherman Law is attested by the fact that thirty-four states, as friends of the Court, supported Georgia's request that the decision be reviewed on certiorari. And so we brought the case here. 315 U. S. —.

The only question in the *Cooper* case was "whether, by the use of the phrase 'any person,' Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act." 312 U. S. at 604. Emphasizing that the United States had chosen for itself three potent weapons for enforcing the Act, namely, criminal prosecution under §§ 1, 2, and 3, injunction under § 4, and seizure of property under § 6, the Court concluded that Congress did not also give the United States the remedy of a civil action for damages. This interpretation was drawn from the structure of the Act, its legislative history, the practice under it, and past judicial expressions. It was not held that the word "person", abstractly considered, could not include a governmental body. Whether the word "person" or "corporation" includes a State or the United States depends upon its legislative environment. *Ohio* v. *Helvering*, 292 U. S. 360, 370. The *Cooper* case recognized that "there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law." 312 U. S. at 604-05. Considering all these factors, the Court found that Congress did not give to the Government, in addition to the other remedies exclusively provided for it, the remedy of treble damages—the only remedy originally given to victims other than the Government of practices proscribed by the Act.

The considerations which led to this construction are entirely lacking here. The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law.[1] Nor can it seize property transported in defiance of it. And an amendment was necessary to permit suit for an injunction by others than the United States. See *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70-71, and Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737. If the State is not a "person" within § 8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act.

The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a

[1] In 1914 Congress rejected an amendment to authorize the Attorney General of any State to institute a criminal proceeding, in the name of the United States, to enforce the anti-trust laws. 51 Cong. Rec. 14519, 14527.

violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. We have already held that such a remedy is afforded to a subdivision of the State, a municipality, which purchases pipes for use in constructing a waterworks system. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390. Reason balks against implying denial of such a remedy to a State which purchases materials for use in building public highways. Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word "person", in § 7 as to exclude a State. Such a construction would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State.[2]

Reversed.

Mr. Justice BLACK concurs in the result.

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[2] We put to one side the suggestion that if the Sherman Law gives a State a right of action, Article III of the Constitution would give this Court original jurisdiction of such a suit if a State saw fit to pursue its remedy here. If the district courts are given jurisdiction, a State may bring suit there even though under Article III suit might be brought here. United States v. California, 297 U. S. 175, 187.

Mr. Justice ROBERTS.

I agree that this case is not ruled by our decision in *United States* v. *Cooper Corp.*, 312 U. S. 600. Certain of the reasons adduced in support of that decision are inapplicable here. I am, nevertheless, of opinion that the judgment should be affirmed. I base this conclusion upon the plain words of the Sherman Act. Section 7 provides that "any person who shall be injured in his business or property by any other person", by any action forbidden by the statute, may sue and recover damages therefor. Section 8 provides that the word "person" or "persons", wherever used in the Act, "shall be deemed to include corporations and

associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

If the word "person" is to include a state as plaintiff, it must equally include a state as a defendant or the language used is meaningless. Moreover, when in §8 Congress took the trouble to include as "persons" corporations organized under the laws of a state, the inference is plain that the state itself was not to be deemed a corporation organized under its own laws any more than the United States is to be deemed a corporation organized under its own laws.

It is not our function to speculate as to what Congress probably intended by the words it used or to enforce the supposed policy of the Act by adding a provision which Congress might have incorporated but omitted.